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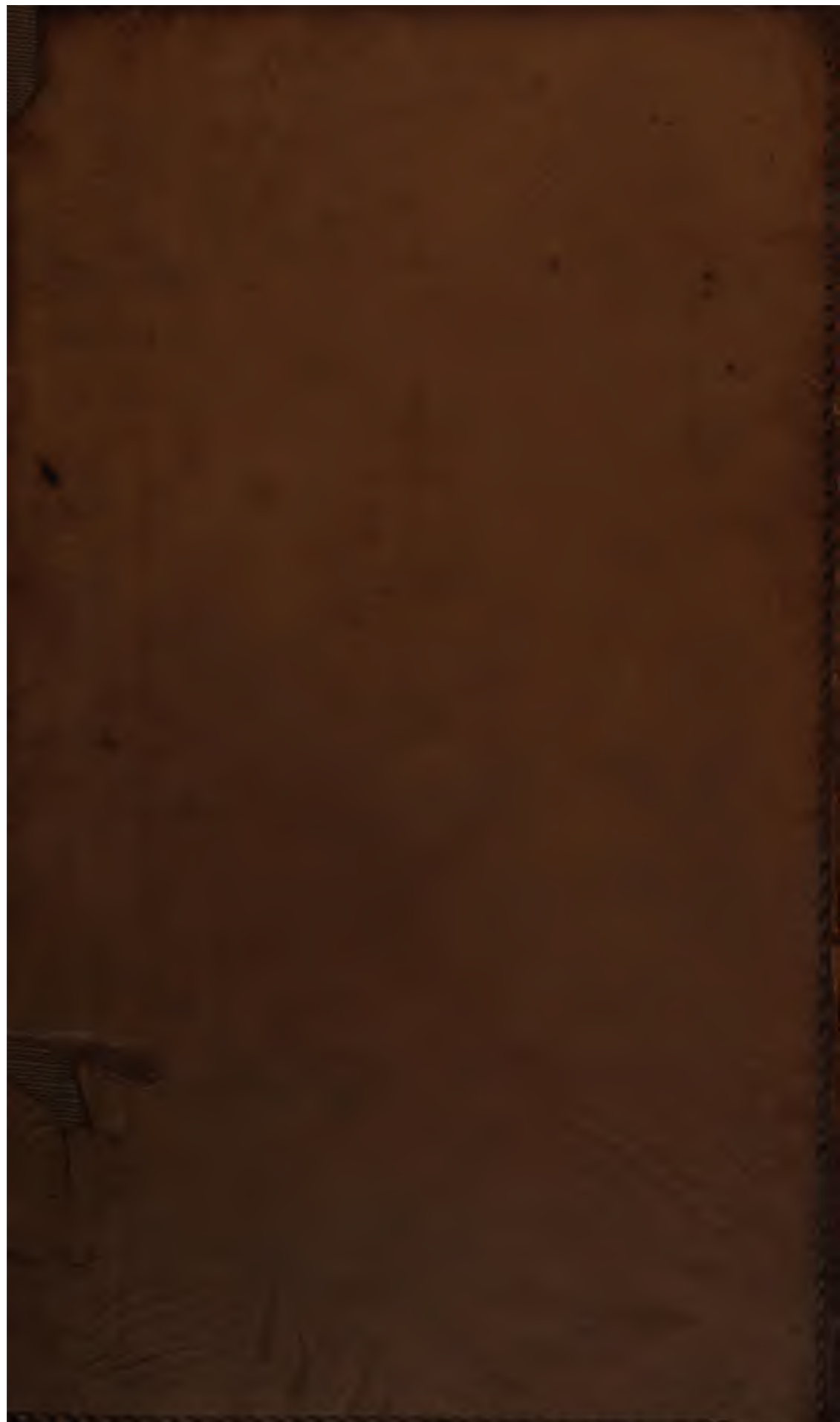
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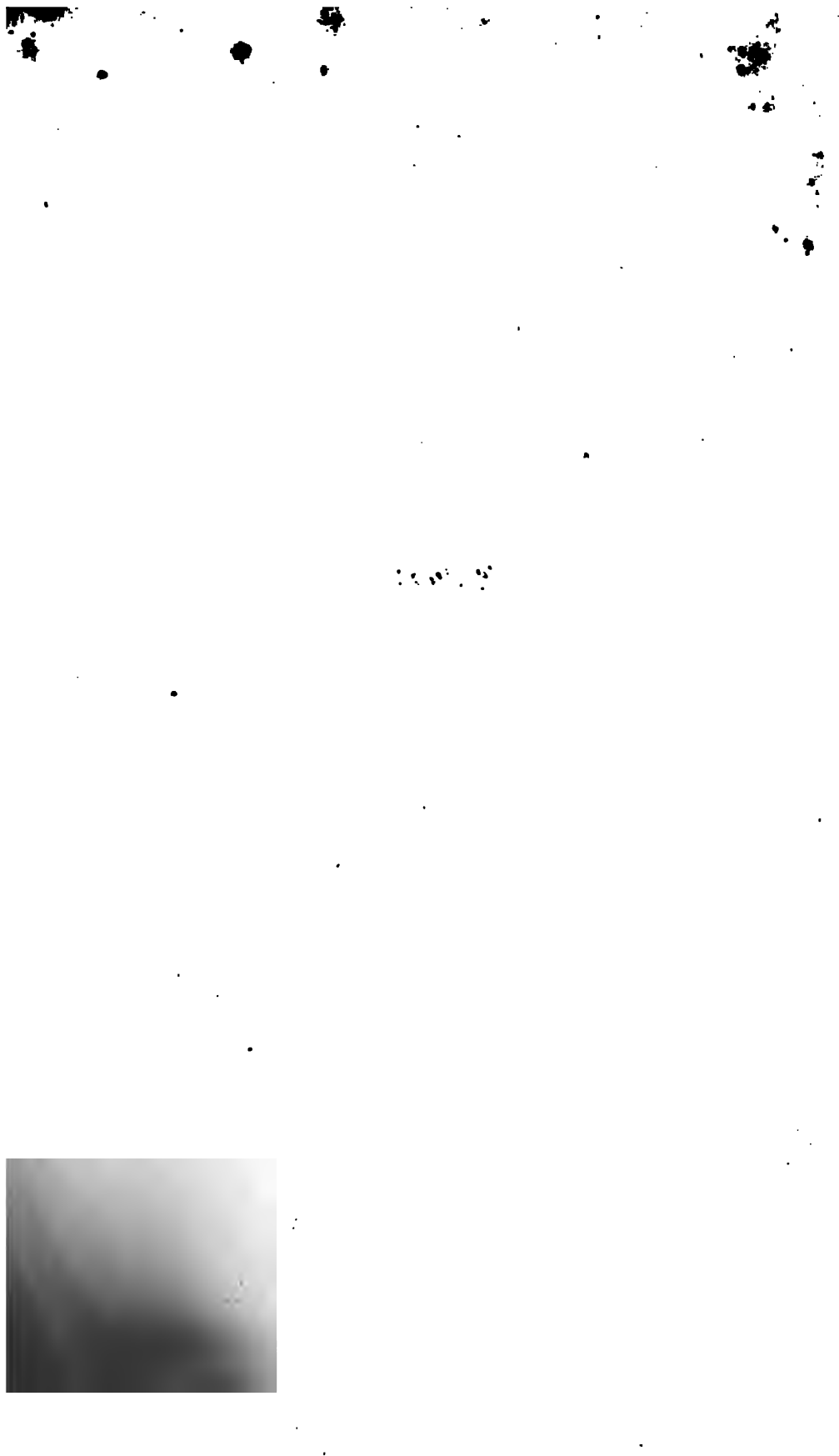
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A
COLLECTION
OF
ACTS AND RECORDS OF PARLIAMENT,
WITH
REPORTS OF CASES
ARGUED AND DETERMINED
IN
THE COURTS OF LAW AND EQUITY,
RESPECTING
T I T H E S.

By **SIR HENRY GWILLIM, KNT.**
LATE ONE OF HIS MAJESTY'S JUDGES OF THE SUPREME COURT
AT MADRAS.

THE SECOND EDITION,
WITH NOTES, REFERENCES, AND A CONTINUATION OF THE
CASES AND STATUTES;
By **CHARLES ELLIS,**
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

IN FOUR VOLUMES.

VOL. I.

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TO

THE SECOND EDITION.

THE present edition of **SIR HENRY GWILLIM's** Collection of Acts, Records, and Cases, on the subject of Tithes, contains the addition of the Statutes and Cases from the year 1800, to Michaelmas Term 1824 inclusive; and also of a considerable number of printed and manuscript cases inserted in the body of the original work.

The reported cases are, for the most part, given in a form more or less abridged, but the judgements are, with few exceptions, printed at length, and where the statements and evidence have been curtailed, it will be found that the judgements sufficiently comprehend the excepted parts, to supply their deficiency: the arguments of counsel, though not the least valuable, yet, as less essential to a compilation containing numerous cases on the same point, have been, with few exceptions, abridged or left out altogether; and notwithstanding this reduction, the cases decided and reported since the date of the last edition, amounting to little less than three hundred in number, have greatly swelled the original size of the work.

In order to bring the work down to the latest period, several manuscript cases, from notes taken by the editor, have been introduced towards the conclusion.

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He need scarcely apologize for not having prefixed a treatise according to the original intention of SIR HENRY GWILLIM. He had, indeed, made some progress in compiling a work of that kind, when he became convinced both by the opinion of many members of the profession, whose opinions were to be respected, and from his private judgment, that it would have been an appendage of little use; if concise, it would have been of little practical service, and if extended, so as to give a general view of the subject, the profession might well have complained of an unnecessary repetition of the same materials in another form.

*Lincoln's Inn,
December 1, 1824.*

PREFACE.

IT will naturally be asked, upon the first appearance of the following pages, how it has happened, that a work which has been so long announced, is at last brought forward in an imperfect state? To that inquiry I answer, that the execution of the work upon the plan which I had originally projected, and upon which I still hope, with God's good will, to prosecute it, has lately been interrupted, and may yet be delayed, by the peculiar circumstances of my situation; and that, considering what those circumstances are, I do not think I should be warranted in withholding from the profession until I had completed the whole, the part which I now venture to lay before them. The very title which I have given to that part, and which, I believe, is correct, shews that it does not depend upon the tract which I propose to prefix to it; that it may be read without reference to it, and studied without the aid of it. It contains the materials, with the exception of a few hints and incidental passages thinly scattered over our juridical histories, from which the doctrines which the tract would establish must be collected, and is, in truth, the foundation upon which the positions there advanced must be supported. Here are to be found the authorities to which the tract will appeal; here are to be found the premises from which its conclusions will be drawn. From those premises the reader will, without the help of the tract, arrive at the same conclusions, if those conclusions be just; if they be not so, he will not regret the want of such a guide.

Thus much being premised by way of apology for the present publication, I will beg leave to state in a few words

the contents of it. It has been my object to collect in it all such acts and records of parliament relating to the subject of Tithes, as my diligence has led me to, or as appeared to me to be material, together with the decisions of the several courts of law and equity. All these I have disposed, and I believe with few interruptions, in a chronological order ; an arrangement which seemed to me the most eligible, because the points of the several cases will be distributed under their proper heads in the tract to which I have already alluded. Many of those cases appear now for the first time in print ; others of them in a more correct and perfect state. It will in general be found either at the head of the case, or in a note subjoined to it, to whom I am obliged for the communication of the manuscript : where I have omitted to notice it, it is not because I do not think the report of equal authority and entitled to equal credit with the others, but because it was communicated to me with an injunction to conceal the source whence I derived it. An intelligent reader will not want to know the historian to enable him to appreciate the merits of the history : the profession will not require me to betray the confidence reposed in me, in order to satisfy the curiosity of men whose opinions are determined by the accident of a name.

I had some doubts, whether I should insert in the collection any other than the manuscript cases, whether I should introduce those reports which are already in print, and are to be found in most of the law-books. I was fearful, that it might be objected, that I was offering to the public what they were already in possession of, and calling upon them to pay again for the same thing in a somewhat different shape. But, upon consulting with men, whose opinions I revered, (and their opinions were peculiarly entitled to respect in a case of this kind, for they were neither authors nor booksellers,) I was advised to make my collection as full as possible. It seemed to them, that it would be wrong to confine myself only to those detached portions of history, which had hitherto lain in manuscript ; that there was an awkwardness in par-

tial reference and partial detail ; and that I should render a service not altogether unacceptable to the profession (for I should save them much manual labour and muscular exertion) if I were to present to them in a commodious form the several cases upon the subject of Tithes, which lie dispersed in many a cumbrous folio. I have acted in obedience to that advice; and in the following pages the reader will find, with much of novelty, much that he has already read, and may already possess. It was my object to make a *whole* ; and whilst the whole consists of all its parts, I cannot compliment the reader with a rejection of some of the parts, when I give him the whole.

I have to regret, that the marginal abstracts of the cases are not always entitled to that credit which they ought to carry with them. Those will, in general, be found, I believe, the most faulty, which are affixed to the cases extracted from the printed books. The truth is, that too easy admission was given to what had been already published ; and from the want of due examination, the looseness or inaccuracy of the statement was not discovered until it was too late to correct it. However, I am confident, that these defects will be amply supplied in the index, the care of preparing which is devolved upon a Gentleman of extensive legal information and great critical exactness. He will, no doubt, seize many points which have escaped me, and retrace passages which I have left too faintly marked.

The tract which I intend to prefix to these volumes will, I hope, be ready for publication in no very great length of time. A part of it is actually printed ; and I am not aware of any other obstacles than those which the elements, a tropical climate, or the incidents of war, may raise, that are likely to interrupt the completion of it. The work has hung longer than it ought to have done, since I gave the profession reason to expect it, and I have to apologize to them for the delay. I am not, however, conscious that much of that delay, great as it has been, can be fairly imputed to me. It was not a matter of a day to

PREFACE.

collect the manuscripts which I have been favoured with, as they lay in many hands. The communications were not always obtained with equal facility. My applications were sometimes silenced by the deep tones of business, and sometimes waved by the civil apologies of gentlemanly indolence. I had sometimes to hear from clerks that their masters were inaccessible, except to clients; I had sometimes to excuse myself for intruding upon men who had nothing to do. It is, surely, not to be wondered at, if I was occasionally disconcerted; if languor succeeded to disappointment, and I became indifferent to a work, about the prosecution of which the world shewed no concern. But this was not the only cause which contributed to check its progress. It seemed to little purpose to state and discuss the law, when the subject-matter itself was threatened with annihilation; when men were industriously taught to believe that agriculture would derive vigour from the abolition of Tithes, and the state would find resources in their ruins. A bold financial policy, favoured by the indifferency of a great part of mankind to every thing connected with religion, and supported by the zeal of sectarism, the wiles of interest, and the prejudices of ignorance — at the view of such a combination acting at a most alarming juncture, amidst the distresses of war and of scarcity, I will confess, I have often thrown down my pen, and desisted from the pursuit of an inquiry which seemed to be fruitless.

HENRY GWILLIM.

Portsea,
March 2, 1801.

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A C T S
AND
RECORDS OF PARLIAMENT
RELATING TO
TITHES,
&c. &c.

The Statute of *Circumspectè Agatis*, made 13 E. I. and
A. D. 1285. Stat. 4. c. 1.

Certain Cases wherein the King's Prohibition doth not lie.

THE king to his justices, greeting: — Use yourselves circum- 1285.
spectly in all matters concerning the bishop of *Norwich* and
his clergy, not punishing them if they hold pleas in court christian
of such things as are merely spiritual; (to wit),

If a parson demand tithes, greater or smaller, so that the fourth
part of the value of the benefice be not demanded.

Item, If a parson demand mortuaries in places where a mortuary
hath been used to be given.

In these cases the ecclesiastical judge hath cognizance, notwith-
standing the king's prohibition.

The lord the king answered to these articles, that in tithes, ob-
ventions, oblations, mortuaries, when the question is as aforesaid,
there is no room for a prohibition. But, if a clerk or religious
person shall sell his tithes to any one for money after they are ga-
thered into his barn or any where else, and plea be holden thereof
in the spiritual court, the king's prohibition hath place; because
by the sale the things spiritual become temporal, and so the tithes
pass into chattels.

Item, If debate arise upon the right of tithes having its origin [2]
in the right of patronage, and the quantity of those tithes exceed
the fourth part of the benefice, the king's prohibition hath place.

Stat. 9 E. II. (*Articuli Cleri*), c. 1. A. D. 1315.

No Prohibition shall be granted where Tithes are demanded, but
where Money is paid for them.

FIRST, Whereas laymen purchase prohibitions generally, upon
tithes, obventions, oblations, mortuaries, redemption of penance,

1315. violent laying hands on clerks or converts, and in cases of defamation, in which cases spiritual penance ought to be enjoined; the king doth answer to this article, that in tithes, oblations, obventions, mortuaries (when they are propounded under these names), there is no ground for the king's prohibition, although, for the long withholding of the same, the money may be esteemed at a sum certain. But, if a clerk or a religious man sell his tithes, being gathered in his barn, or in any other place, to any man for money, if the money be demanded before a spiritual judge, the king's prohibition lies, for by the sale the spiritual goods are made temporal, and the tithes turned into chattels.

c. 2. Debate upon the Right of Tithes exceeding the Fourth Part.

Also, if debate arise upon the right of tithes having its original in the right of the patronage, and the quantity of the same tithes amount to the fourth part of the goods of the church, the king's prohibition holdeth place, if the cause come before a judge spiritual.

c. 5. No Prohibition where Tithe is demanded of a new Mill.

Also, if any one erect in his ground a mill of new, and after the parson of the same place demand tithe for the same, the king's prohibition issues in this form: *Quia de tali molendino hactenus decimæ non fuerunt solutæ prohibemus, &c. Et sententiam excommunicationis, si quam hæc occasione promulgaveritis, revocetis omnino.*

The Answer. — In such case the king's prohibition was never granted by the king's assent, who decrees that it shall not hereafter lie in such cases.

[3]

Rot. Parl. 17 E. III. No. 29. A. D. 1343.

Tithe of
wood.

THE commons pray, that no man be drawn in plea in court christian for tithes of wood or underwood, except in places where such tithes have used to be paid.

Answer. — Let it be done of this as it hath been done heretofore.

A Statute of the Clergy, made 18 E. III. and A. D. 1344.

Stat. 3. c. 7. Rot. Parl. No. 7.

No *Scire Facias* shall be awarded against a Clerk for Tithes.

ITEM, Whereas writs of *scire facias* have been granted to warn prelates, and religious, and clerks, to answer tithes in our chancery; and to shew if they have any thing, or can any thing say, why such tithes should not be restored to the demandants; and to answer, as well to us as to the party of such tithes: that such writs as aforesaid henceforth be not granted; and that the process pending upon such kind of writs be annulled and repealed; and

that the parties be entirely dismissed from before the secular judge of such manner of pleas as aforesaid; saving to us our right, such as we and our ancestors have had, and were wont to have of reason.

1347.

Rot. Parl. No. 9. *Eodem Anno.*

THE commons pray, that as a constitution is made by the prelates to take tithes of all manner of wood, which thing was never used, and that niefs and wives might make testaments, which is against reason; that it would please the king, by him and his good council, to ordain a remedy, and that the people should remain in the same state as they have used to be in the time of all his progenitors, and that prohibitions should be granted to all those who are empled of the tithes of wood, without having a consultation.

Of tithe of wood.
This petition in Mr. Serjeant Rolle's Abridgement is No. 12.

Answer. — The king wills that law and reason be done.

Rot. Parl. 21 E. III. No. 48. A. D. 1347.

THE commons shew, that lately the archbishop of *Canterbury*, and the other prelates, ordained a constitution to give tithes of underwood sold only, whereas before this time no tithes thereof were given; and now the men of holy church, by force of the constitution, take and demand tithes, as well of great wood as of underwood, sold and not sold, against what they have used from time immemorial, to the great damage of the commons; wherefore they pray remedy in each point.

Tithe of wood.

[4]

Answer. — The archbishop of *Canterbury*, and the other prelates, have answered, that such tithe is demanded by reason of the aforesaid constitution, only of underwood.

Rot. Parl. 25 E. III. No. 27. A. D. 1351–2.

THE commons pray, that if the clergy, in right of tithes of highwood and underwood, or of any other thing, demand or attempt any thing new, but only that, and in those places, whereof they have been of old time seised in right of their churches; that it may please our lord the king to grant a prohibition thereof, without a consultation, to all those who will ask it in such case; and that the said people of holy church be forbidden to demand tithes of gross wood.

Of tithe of wood.

Answer. — The king and his council will advise of this petition.

Rot. Parl. 43 E. III. No. 17. A. D. 1369.

THE commons pray, that it be declared in what case tithe of wood and of underwood ought to be given of right, in places where it hath not been given heretofore; and also that it be put in certain, what manner of wood ought to be called *silva cædua*;

Of tithe of wood.

1369. and in case any one be empleaded in court christian of the tithes of wood or underwood, that a prohibition be granted thereafter, and an attachment thereupon in chancery, as well to the judges as parties, as is customary in other cases, without having a consultation.

Answer. — Let the statute in this case ordained be kept and holden.

Stat. 45 E. III. c. 3. A.D. 1371.

A Prohibition shall be granted where a Suit shall be commenced in the Spiritual Court for *Silva Cædua*.

A prohibition shall be granted where a suit is commenced in the spiritual court for *silva cædua*.

[5]

* The record at this part "prays the king and his

council, that he will apply a suitable remedy to this, and openly declare and interpret these words *silva cædua*, as, in the understanding of the commons, underwood is comprized in these words, *silva cædua*, and not trees of such age."

ITEM, at the complaint of the said great men and commons, shewing by their petition, that whereas they sell their great wood of the age of twenty years, thirty years, forty years, or of greater age, to merchants to their own profit, and in aid of the king in his wars, parsons and vicars of holy church emplead and draw the said merchants in the spiritual court for the tithes of the said wood, in the name of these words called *silva cædua*, whereby they cannot sell their woods to the very value, to the great damage of them, and of the realm *: It is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath been used before this time.

Rot. Parl. 47 E. III. No. 9. A.D. 1373.

Tithe of wood.

ALL the commons of the realm pray, that whereas at the last parliament holden at *Winchester*, the lords and commons of the land made their complaint, that parsons and vicars of holy church travailed them in court christian for the tithes of great wood, that is to say, of the age of 20 years and above, by colour of this word *silva-cædua*; at their request it was ordained, that no wood that was or should be of the age of 20 years and more, should be tithable; and the parsons of holy church intending that this ordinance doth not restrain them of their ancient encroachment, surmising that this was never affirmed for a statute, make citations in court christian against the ordinance aforesaid, to the great damage of the people; wherefore may it please our said lord the king to affirm the said ordinance for a statute to endure for the time to come; and that a special prohibition upon the same statute be made thereof in chancery, forbidding them to hold plea in court christian of tithes of wood of the age aforesaid.

Answer. — Let there be such prohibition granted as hath been used of ancient times.

Rot. Parl. 50 E. III. No. 141. A. D. 1376.

1376.

THE clergy pray, that although tithe of wood, especially of *silva cædua*, is payable to God and the church of divine and ecclesiastical right; yet, where the question before the ecclesiastical judge is merely upon the tithe of *silva cædua*, the king's prohibitions are directed to the party and the judge, and the due and long accustomed consultations are not granted, but are too much restrained by clauses now of late subtilly invented against justice, so that the ecclesiastical judges, having conuzance in causes of *silva cædua*, from the dread of such clauses so lately inserted as aforesaid in consultations of this kind, will not dare to proceed; and although a sufficient consultation be granted, such as was wont to be granted anciently, a prohibition similar to the first is obtained again upon the same matter: and nevertheless, if afterwards a second consultation being previously obtained, the judge proceed any farther in the cause, an attachment is given against the judge, the advocate, and the party, notwithstanding such last consultation: wherefore the same clergy pray, that in a cause of *silva cædua*, due and customary consultations be granted without any difficulty and restriction whatsoever; that the aforesaid attachment, or any other molestation or disturbance in the secular court, cease, even after the first consultation granted; and that it may be lawful for the ecclesiastical judge after that, notwithstanding the king's prohibition may be afterwards obtained, to proceed with impunity, without offence to the king's majesty, and freely, without first obtaining another consultation.

Tithe of wood.

[6]

Answer. — One consultation granted is sufficient by the law in the same cause or plaint; and if it be necessary, they shall have a special clause for prohibitions made, or to be made.

Rot. Parl. No. 203.

ITEM, In tithe causes it is sometimes objected, that the tithes exceed the fourth part of the value of the church, and thereupon the king's prohibition is obtained, and thereby the secular court hath conuzance in a cause of tithes notoriously against the laws.

Rot. Parl. No. 205.

ITEM, If any one be drawn before the secular judge upon tithes under the name of chattels, and, being so drawn, he propound before the secular judge that they are tithes, and not chattels; let the ecclesiastical judge, not the secular judge, decide this, and terminate the question.

[It seems rather doubtful whether any answer was given to either of these petitions.]

1976-7.

Rot. Parl. 51 E. III. No. 80. A. D. 1376-7.

[7]

THE clergy pray, that whereas the tithes of wood called *silva cædua* are to be paid to God and holy church, of divine right and the right of holy church, nevertheless, where process is hanging of such kind of tithes before judges of holy church, the king's prohibitions are directed to the judges and parties, and the consultations due and according to the laws of holy church, as in the articles and petitions following is more fully contained, are not granted; wherefore the said prelates and clergy pray, that in cases of tithes of such manner of *silva cædua* due consultations be granted, without any difficulty whatsoever.

Answer. — Let the law thereof be used as heretofore it hath reasonably been.

Stat. 1 R. II. c. 13. Rot. Parl. No. 118. A. D. 1377.

Ecclesiastical Judges shall not be vexed for Suits for Tithes in a Spiritual Court.

THE prelates and clergy of this realm greatly complain that the men of holy church, and others, suing for their tithes, and other things, in the spiritual court to which such causes ought, and were wont to pertain, and the judges of holy church, having cognisance in such causes, and other persons intermeddling therein according to law, be maliciously and unduly for this cause indicted, imprisoned, and by secular power horribly oppressed, and also enforced with violence by oaths and grievous obligations, and many other means unduly compelled to desist and cease utterly in the things aforesaid, against the liberties and franchises of holy church: wherefore it is assented, that all such obligations made, or to be made, by duress or violence, shall be of no value. And as to those that by malice procure such indictments, and to be the same indictors, after the same inditees be so acquit, such procurers shall have and incur the same pain that is contained in the statute of *Westminster* the second, of those which procure false appeals to be made. And the justices of assizes, or other justices, before whom such inditees shall be acquit, shall have power to inquire of such procurers and indictors, and duly to punish them according to their desert.

c. 14. Rot. Parl. 121. *Eodem Anno.*

In an Action of Goods taken away, the Defendant maketh Title for Tithes due to the Church.

ITEM, It is accorded, that at what time that any person of the holy church be drawn in plea in the secular court for his own tithes taken by the name of goods taken away, and he who is so

1 RICHARD II.

drawn in plea make an exception, or allege that the matter, substance, and source of the business is only upon tithes due of right and of possession to his church, and not otherwise any goods and chattels; that in such case the general averment shall not be taken without shewing specially how the same was his lay-chattel.

1377.

[8]

Rot. Parl. No. 121. *Eodem Anno.*

THE clergy pray, that all manner of tithe of wood called *silva cædua*, due to God and holy church, be lawfully paid. And in case the king's prohibition be delivered to the judge, or party, in a cause upon such kind of tithe, that a full and plenary consultation, without any new or undue restitution in this behalf, be forthwith granted; and that the judges proceeding, the parties pursuing, and all others whatsoever doing their duty on this part, be not for this cause hindered or aggrieved by indictments, imprisonments, condemnations, or in any other manner whatsoever.

Tithe of wood.

Answer. — Let it be done in this case as hath been used before these days.

Rot. Parl. 2 R. II. No. 19. A.D. 1379.

THE commons shew, that great mischief is done by persons of holy church who demand tithes of all manner of wood, by colour of *silva cædua*, and wrongfully harass them in divers parts of the kingdom, by grievous summonses before judges of holy church, so that by such summonses and grievances they pay tithes of great trees, and also for timber which they fall for the repairing of their houses, and for fuel, whereas they were not wont nor ought to pay them of right; but the said commons, from not being able, and from the great favour which the said persons of holy church have before the judges, and for that the judges are parties in such cases, submit to the wrong, in order to avoid greater mischief in future, which has often been done to the said commons heretofore: wherefore they pray remedy, that *silva cædua* be declared in other manner than the clerks have heretofore declared it for their profit, without the assent of the lords, and that it be ordained to be of underwood, or wood of a certain age under ten years; (for before the first pestilence * no tithes of any manner of wood were given, granted or demanded); and that thereupon every man may have a prohibition upon his case; for those of the chancery intend, that of whatsoever age the wood may be, if tithe thereof be required, a prohibition doth not lie thereupon.

Tithe of wood.

* A.D. 1349.

Answer. — Be it used as it reasonably hath been before this time.

1384.

7 R. II. A. D. 1384.

Reg. 69. a.
To what
parliament
to refer this
agreement
Mr. Selden
knows not,
unless to that of 7 R. II. holden at Salisbury, the rolls whereof have nothing of it.

It was agreed before the king's council, in a parliament holden at *Salisbury*, that consultations ought to be granted of *silva cædua*, notwithstanding it is not renewed annually. And thereupon a consultation was awarded for the abbot of *Notley*, in the case of *silva cædua*.

unless to that of 7 R. II. holden at Salisbury, the rolls whereof have nothing of it.

Rot. Parl. 8 R. II. No. 21. A. D. 1384.

Title of
wood.

THE commons pray, that whereas it is ordained by statute, that a general prohibition shall be granted in chancery, wherever men advanced to benefices of holy church demand tithes in court christian of great wood which is passed the age of twenty, thirty, or forty years, when such wood is cut and sold; and because no special prohibition is granted by the said statute, the said men of holy church sue in court christian for the tithes aforesaid, notwithstanding such general prohibition directed to them, to the great damage and mischief of those who sell their wood in the form aforesaid; may it please our lord the king, to grant a special prohibition, with attachments thereupon, against the ordinaries and those who sue against the statutes as aforesaid.

Answer. — Be it done as was heretofore ordained by the statute made at *Westminster*, in the 45th year of the reign of our grandfather, whom God have mercy upon.

Rot. Parl. 14 R. II. No. 29. A. D. 1390.

Title of
wood.

THE commons of the land pray, that whereas parsons and vicars claim and demand of the said commons tithes of wood, that is, as well of wood of the age of 40 or 60 years, as of the age of 9 or 10 years, and sue and emplead them in court christian, to the great travail, cost, and loss of the said commons, notwithstanding the statute before these times thereof ordained, by reason that the words *silva cædua* are not expounded nor declared in certain; may it therefore please our lord the king to ordain, that the said words *silva cædua* may be declared, determined, and ascertained, that the country, which hath been duly tithable from the 20th year of king *Edward*, since the conquest, be charged with such tithes according to the tenor of a statute thereof made before these days, and not otherwise, so that the said commons may be certain of what manner of wood they ought to pay tithes, at the final discussion of the aforesaid debates.

[10]

Answer. — Be it as it hath been heretofore.

Stat. 15 R. II. c. 6. Rot. Parl. No. 38. A. D. 1391. 1391.

In Appropriation of Benefices there shall be Provision made for the Poor and the Vicar.

BECAUSE divers damages and hindrances oftentimes have happened, and daily do happen to the parishioners of divers places, by the appropriation of benefices of the same places; it is agreed and assented, that in every licence henceforth to be made in the chancery, of the appropriation of any parish church, it shall be expressly contained and comprised, that the diocesan of the place, upon the appropriation of such churches, shall ordain, according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same churches, by those that will have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed.

Rot. Parl. No. 44. *Eodem Anno.*

THE commons pray, that whereas in many parts of the realm divers persons are sued, travailed, and put to great costs, and some are excommunicated in court christian for tithes of great trees as well as of seasonable wood, under colour of this word *silva-cædua*; that it may please our lord the king, and the very sage lords of this parliament, that this word *silva-cædua* be declared, and the age of wood tithable be ascertained, in this present parliament, in ease of the said commons, considering that divers bills upon this matter have been inserted in the petitions of the commons in several parliaments before these days, and no remedy is ordained.

Answer. — Be it used as it hath been used heretofore.

Stat. 2 H. IV. c. 4. A. D. 1400-1.

[11]

The Penalties for the purchasing of Bulls to be discharged of Tithes.

FOR as much as our lord the king, upon grievous complaint to him made in this parliament, hath perceived, that the religious men of the order of *Cisteaux* in the realm of *England* have purchased certain bulls to be quit and discharged to pay the tithes of their lands, tenements, and possessions let to ferm, or manured, or occupied by other persons than by themselves, in great prejudice and derogation of the liberty of holy church, and of many liege people of the realm; our lord the king, willing thereupon to ordain remedy, by the advice and assent of the lords spiritual and temporal, and at the instance and request of the said commons, hath ordained and stablished, that the religious persons of the order of

1400-1. *Cisteaux* shall stand in the estate that they were before the time of such bulls purchased; and that as well they of the said order, as all other religious and seculars, of what estate or condition they be, who put the said bulls in execution, or from henceforth purchase other such bulls of new, or by colour of the same bulls purchased, or to be purchased, take advantage in any manner, that process shall be made against them, and every of them, by garnishment of two months by writ of *præmunire facias*; and if they make default, or be attainted, then they shall incur the pains and forfeitures contained in the statute of provisors, made the thirteenth year of the said king *Richard*.

Rot. Parl. No. 51. *Eodem Anno.*

Of appro-
priations of
churches.

THE commons pray, that no appropriation of any church be henceforth made; and that he who enjoys such appropriation in future, incur the penalty contained in the statute of provisors; except that religious or any other persons whosoever who have possessions in mortmain, may exchange and give such possessions so in mortmain to secular hands, in order to have such benefice appropriated with the licence of the king, the patron, the lord, and the founder.

Answer. — The king will advise upon it.

Rot. Parl. No. 59. *Eodem Anno.*

[12]
Of tithe
of wood.

THE commons [*after reciting the statute of 45 Edw. III.*] say, that notwithstanding this statute, parsons and vicars of holy church claim tithes of all manner of wood as they were wont to do before, because consultations in this case in chancery have so easily been granted by colour of these words *silva cædua*; they therefore pray, that the king would please to ordain, that no consultation be granted by these words *silva cædua*, if it be so that the wood of which tithes are claimed be of the age of 20 years or more at the time of cutting; and that a penalty be thereupon ordained in this present parliament.

Answer. — Be it used as it hath been used before these days.

Rot. Parl. No. 93. *Eodem Anno.*

Agistment.

ITEM, Priountles communes, q
par la ou diverses gentz de seinte
esglise empledont plusours lieges
du roialme en court christian
pur dysmes d'engystementz de
certains terres, prees, pastures,
& vastes, lesqueux ne ount my

ITEM, The commons pray,
that whereas divers men of holy
church implead many liege sub-
jects of the realm in court chris-
tian for tithes of agistment of
certain lands, meadows, pastures,
and wastes, which have not been

2 HENRY IV.

este dismez d'engystement devant ces heurs; cestassavoir, des terres semez & prees mesme l'an apres ceo qu'ils ont pris leur dismes des blees & de fyn, & des pastures & vastz, queux ont este dismes d'engistementz a nul temps, la ou les ditz persones de seinte esglise nount leur dismes continuelment de les agnelez, velez, & autres tieux maneres de dismes avenantz & esteantez sur les ditz terres, prees, pastures, & vastez, a graunt damage & dissesse si bñ a seign̄rs come altres pours tenants de les commons du roialme: Que plese a nre sr le roy, en cest present parlement, pur faire declaration, lequel les ditz dismes d'engestement seront paieiz ou non; & pour ordiner prohibition ou autre due remede encontre les persones de seinte esglise, queux servent tieux plees en court christiane encountre ascun de les lieges le roy, encountre droit, ley, & reson.

Responsio. — Celluy q̄ soy seente greve sue en especial

tithable of agistment before these 140
days; that is to say, of lands
sown and meadows the same
year after they have taken their
tithes of corn and hay, and of
pastures and wastes, which have
at no time been tithable for agist-
ment, where the said persons of
holy church take their tithes con-
tinually of lambs, calves, and
other such manner of tithes
coming and being upon the said
lands, meadows, pastures, and
wastes, to the great damage and
disseisin, as well of lords as of
others, poor tenants of the com-
mons of the realm: May it [
please our lord the king, in this
present parliament, to make de-
claration, whether the said tithes
of agistment shall be paid or not;
and to order a prohibition or
other due remedy against the
persons of holy church, who
shall serve such pleas in court
christian against any of the liege
subjects of the king, against
right, law, and reason.

Answer. — Let him who shall
find himself grieved sue specially.

Stat. 4 H. IV. c. 12. A. D. 1402.

In Appropriations of Benefices Provision shall be made for the
Poor and the Vicar.

It is ordained, that the statute of appropriation of churches, and of the endowment of vicars in the same, made the fifteenth year of king *Richard* the second, be firmly holden and kept, and put in due execution; and if any church be appropriated by licence of the said king *Richard*, or of our lord the king that now is, sithence the said fifteenth year, against the form of the said statute, the same shall be duly reformed according to the effect of the same statute, betwixt this and the feast of *Easter* next coming. And if such reformation be not made within the time aforesaid, that the appropriation and licence thereof be made void, and utterly repeal-

1402. ed and adnulled for ever; except the church of *Hadenham* in the diocese of *Ely*, which, for to eschew divers damages, discords, and debates, that have been before this time betwixt the bishop of *Ely* and the archdeacon of *Ely*, upon the exercise of their jurisdiction, (as it was openly declared by the same bishop in presence of the king, and of the lords in parliament,) was of late appropriated, by the licence of the king our lord, to the archdeacon and his successors to do divine service, keep hospitality, and to support other charges as pertaineth. Moreover it is ordained and stablished, that all the vicarages united, annexed, or appropriated, and the licences thereof had after the first year of the said king *Richard*, how well soever that they who have united, annexed, or appropriated

[14] such vicarages, be in possession of the same vicarages, or by virtue of such licences may in any wise be in possession of the same in any time to come, they shall be also utterly void, revoked, repealed, adnulled, and disappropried for ever; and that henceforth in every church so appropriated, or to be appropriated, a secular person be ordained vicar perpetual, canonically institute and induct in the same, and covenantably endowed by the discretion of the ordinary to do divine service, and to inform the people, and to keep hospitality there, except the church of *Hadenham* aforesaid; and that no religious be in any wise made vicar in any church so appropriated, or to be appropriated, by any means in time to come.

Stat. 5 H. IV. c. 11. A. D. 1403-4.

The Fermors of Aliens shall pay their Tithes to the Parson of the same Parishes.

It is ordained and established, that the fermors, and all manner of occupiers of the manors, lands, tenements, and other possessions of aliens, shall pay and be bound to pay, all manner of *dismes* thereof due to parsons and vicars of holy church, in whose parishes the same manors, lands, tenements, and possessions be so assigned and due, as the law of holy church requireth, notwithstanding that the said manors, lands, tenements, or other possessions be seized into the king's hands, or notwithstanding any prohibition made or to be made to the contrary.

Rot. Parl. No. 65. *Eodem Anno.*

Of tithe of
stones and
slate.

THE commons pray, that whereas many liege subjects of our lord the king are oftentimes vexed and travailed by parsons and vicars of holy church, by citations and censures of holy church, for tithes of stones and slates opened and drawn out of quarries, no tithes having ever been demanded or paid of such stone or slate; that it may please the lord the king to ordain, that if any prohibition be

granted in such case, no consultation may be awarded to the contrary. 1408-4.

Answer. — The king will advise upon it.

Rot. Parl. No. 74. *Eodem Anno.*

THAT the noble ordinances and statutes made in the 4th year of the reign of our lord the king, concerning the appropriations of parochial churches, and the endowments of vicarages therein, may stand in their force and effect, and that they be firmly holden and kept, and put in due execution ; and that if any letters patent be or shall be made to the contrary, they be avoided and holden for null. Of appropriations. [15]

Answer. — Let the statutes thereof made be holden and kept.

Rot. Parl. 7 and 8 H. IV. No. 119. A.D. 1406.

THE commons pray, that it be ordained and established in this present parliament, that if any person, religious or secular, of what estate or condition soever he be, by colour of any bulls containing privilege to be discharged of tithes appurtenant to parish churches, prebends, hospitals, or vicarages, purchased before the first year of the reign of the king *Richard*, late king of *England*, the second since the conquest, * not executed, have disturbed and will not suffer, or, by any bulls hereafter to be purchased, disturb and do not suffer any person of holy church, whether he be parson of a church, prebendary of a prebend, warden of an hospital, vicar, or other person whatsoever, to take and enjoy the tithes anciently due to the same churches, prebends, hospitals, vicarages, or other benefices of holy church, that the same disturbers be punished by such process and penalty as is ordained by the statute of the second year of the reign of our lord the now king, against those of the order of *Cisterians*. Bulls, &c. * nient execut.

Answer. — The king wills, that no person, of what estate or condition soever he be, put in execution any such bulls purchased before the first year of king *Richard* the second, or since, or any such bulls to be purchased in time to come ; and that if henceforth any person, religious or secular, of what estate or condition soever he be, by colour of such bulls disturb any such persons of holy church, so that they cannot take and enjoy the tithes due to them, and belonging to their said benefices, that such disturber incur such process and pain as is ordained by the statute of the second year of our lord the now king, against those of the order of *Cisterians*.

Rot. Parl. 2 H. V. No. 7. A.D. 1414.

THE commons pray, that whereas they are often empled in court christian for tithes of great wood of the age of 20 years, Of tithes of wood.

1414. and of 40 years, and more, by the name of these words *silva cædua*,
 [16] and in the statute made in the time of king *Edward*, the great
 grandfather of the lord the now king, in the 45th year of his reign,
 it is contained, that a prohibition be granted in this case, and
 thereupon an attachmēt, as it hath been used before these days; by
 which statute no full declaration is made what wood is tithable,
 and what not, wherefore the justices of the land are of different
 opinions upon this matter; that it please our lord the king to limit
 and ordain, by the advice of the lords of this present parliament,
 that all manner of wood, which is of the age of 20 years or more,
 shall not be tithable in any manner for the time to come; and if it
 be under the age of 21 years it shall be tithable, if the custom of
 the country, where such wood is growing, demands it, and that in
 this case there be a prohibition, and thereupon an attachment,
 without granting a consutation.

Answer. — Because the matter of the petition requires great and
 mature deliberation and declaration, the king wills, that the said
 matter be adjourned, and remitted to the next parliament; and
 that the clerk of the parliament cause this article to be brought be-
 fore the king and lords at the beginning of the next parliament, in
 order that a declaration may be had thereupon.

Rot. Parl. 2 H. V. No. 9. A. D. 1414.

An Act for suppressing the Alien Priors.

THE commons pray, that in case final peace should hereafter be
 made between you our sovereign lord and your enemy of *France*,
 and thereupon all the possessions of the alien priories in *Eng-
 land* should be restored to the chief houses of the religious
 abroad, to which those possessions are belonging, damage and loss
 would come to your said kingdom, and to your people of the same
 kingdom, by the great rents and revenues which, from year to
 year ever afterwards, would be remitted from the said possessions
 to the chief houses aforesaid, to the very great impoverishment of
 the same your kingdom in this behalf, which God forbid; may it
 please your most noble and most gracious lordship, for the con-
 sideration aforesaid, and also in consideration that, at the beginning
 of the war between the two kingdoms, your liege subjects were, by
 a judgment given in the kingdom of *France*, for ever ousted and
 disinherited of all the possessions which they then had of the gift
 of your noble progenitors in the parts abroad within the jurisdic-
 tion of *France*, most graciously to ordain in this present parlia-
 [17] ment, by the assent of your lords spiritual and temporal, that all
 the possessions of the alien priories, situate in *England*, may remain
 in your hands to you and your heirs for ever, to the intent that
 divine services may henceforth be more duly celebrated in the

aforesaid places by *Englishmen*, than they have hitherto been by *Frenchmen*. 1414.

Provided, that the possessions of the conventual alien priories, and of the priories who are inducted and instituted, and also all the alien possessions given by the most gracious lord the king your father, whom God have mercy upon, to the master and college of *Fotheringay*, and their successors, of the foundation of the said lord the king your father, and of *Edward* duke of *York*, notwithstanding the peace to be made, if any should be, together with all manors, franchises, and liberties, by our said lord the king your father granted to the said master and college, and their successors, and by you confirmed, may perpetually remain by the authority of this present parliament to the said master and college, and to their successors, to the use and intent, according to the tenor and purport of the letters patent of our said lord the king your father, of the foundation of the said college, without any charge or profit to you, most sovereign lord, and your heirs, or to any other person or persons, saving the services due to the lords of the *English* fees, if any there be, notwithstanding the said grant made by our aforesaid lord the king your father, to the said master and college, and their successors, extend only during the war between you, most sovereign lord, and your enemy of *France*; and saving also to every one of your liege subjects, as well spiritual as temporal, the estate and possession which they have at present in any of such alien possessions, whether they have purchased, or are to purchase them in perpetuity, or for term of life, or for term of years, of the chief houses abroad, by the licence of our lord the king your most noble father, whom God have mercy upon, or of king *Edward* the third, your great grandfather, or of king *Richard* the second, since the conquest, or of your own gracious gift, grant, confirmation, or licence, now had in that behalf, paying and supporting all the charges, pensions, annuities, and *corrodies*, granted to any of your liege subjects by you, or any of your noble progenitors, to be taken out of the possessions or alien priories aforesaid.

Answer. — The king wills it: and also that the said master and college of *Fotheringay* have an exemplification from the king, under his great seal, of this petition, for their greater security in this behalf, and that with the assent of the lords spiritual and temporal, in this present parliament assembled. [18]

Rot. Parl. 10 H. VI. No. 12. A. D. 1432.

THE commons, after reciting in their petition the statute of 4 H. IV. proceed thus, "and forasmuch as in that statute no penalty is imposed upon those who have churches to their own use, Appropriation of churches.

1432. in case they suffer the vicarages therein to be inofficiate, and therefore in several parts of the kingdom they have suffered the said vicarages, by the insufficient endowment thereof, and for their own gain, to be inofficiate and void for several years, by reason whereof, in many parishes in the kingdom, old men and women have died without confession, or receiving any other sacrament of holy church, and infants have died without baptism, whereby several mischiefs and inconveniences from day to day happen, to the great dishonour of holy church;" they pray therefore, "That it may be ordained by this present parliament, that if any religious or man of holy church, of what estate or condition soever he be, who have or hold any churches to their own use, hereafter suffer the vicarages of such churches to be inofficiate, without a resident vicar thereon, for six months; that the same churches so holden to their own use, with all their appurtenances and dependencies, be absolutely disappropriated and disamortised for ever, saving only to the said religious and men of holy church their patronage therein, as they had before any appropriations were made of the said churches, or they were holden to their proper use, without having or retaining any pension, portion, annuity, or other charge whatsoever, and saving to the ordinaries their right by lapse.

Answer. — The king will advise upon it.

Rot. Parl. *Eodem Anno.* No. 17.

Great
wood.

In the 11
H. 6. Rot.
Parl. No.
14. there is
a like peti-
tion almost
in the same
words, to
which the
answer is,
"The king
will advise
upon it."

[19]

THE commons, after reciting in their petition the statute of E. III. say, That now so it is, that divers liege subjects of our lord the king are empleaded and travailed in court christian for tithes for the said causes, who thereupon come into the chancery of our lord the king, in order to have a writ of prohibition and of attachment according to the effect of the said statute, which writs are denied to them, against law and right; wherefore that it may please our lord the king, by the advice and consent of the lords spiritual and temporal, in this present parliament, to ordain, by the authority of the same parliament, that those persons who feel themselves aggrieved against the ordinance of the said statute, may have writs of prohibition and attachment thereupon, according to the effect of the said statute; and in case any such prohibition or attachment be denied to any of his liege subjects in the chancery of our lord the king, that then such writs of prohibition and attachment be granted as well in the bench of our lord the king, as in the common bench; and that the writs of prohibition and attachment issuing out of those benches may have the same force and effect, as the original writs of prohibition and attachment so issuing out of the chancery of our lord the king.

Answer. — Let the statute before made be kept and executed according to the tenor thereof.

1492.

Rot. Parl. 19 H. VI. P. 1. M. 30. *Rymer's Fædera.*
Vol. X. P. 802. A. D. 1440.

Grant of the Alien Priories in Fee.

THE Lord King to all to whom, &c. Health. — Know ye that we fully confiding in the fidelity and circumspection of the venerable fathers in Christ, *Henry* (a) archbishop, *John* (b) bishop of *Bath and Wells*, *John* (c) bishop of *St. Asaph*, and *William* (d) bishop of *Salisbury*, and of our beloved and faithful cousin *William* earl of *Suffolk*, and also of our beloved *John Somerseth*, *Thomas Bekyngton*, *Richard Andrews*, *Adam Moleyns*, clerks; *John Hampton*, *James Finys*, esquires; and *William Tresham*; and by reason of the great confidence which we place and have in the aforesaid persons, have given and granted to them all those priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions, being within our kingdom of *England* and *Wales*, and the marches of *Wales* aforesaid, (which are called the late priories and possessions of aliens,) lately appertaining or belonging to any religious house or houses in parts beyond the seas, and in our hands now being: To have and to hold to them, their heirs and assigns, of us and our heirs, by fealty only, for all services, burthens, exactions, and demands, from the feast of *Easter* last past for ever, together with the advowsons of all the said priories, rectories, churches, vicarages, chapels, chantries, hospitals, and other ecclesiastical benefices, which are now called, or lately were called, the priories and possessions of aliens, being within our said kingdom of *England* and *Wales*, and the marches of *Wales* aforesaid, lately appertaining and belonging to any such house or houses in the said parts beyond the seas; together also with all knights' fees, franchises, and liberties whatsoever, to the said premises, or any of them, in any manner belonging or appertaining.

(a) Henry Chicheley.
(b) John Lee.
(c) John Stafford.
(d) William Aiscoth.

[20]

We have granted also to the said archbishop, bishops, earl, *John*, *Thomas*, *Richard*, *Adam*, *John*, *James*, and *William*, all and singular rents and farms, which any person or persons is or are bound to render to us for any such priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions whatsoever: To have and to hold the same rents and farms, together with the reversions as well of the said priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions, when they shall happen, or may or ought to come in any manner to our hands, or the hands of our heirs, as of any other priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions within our kingdom of *England* and *Wales*, and the

1440. marches of *Wales* aforesaid, which are now, as is aforesaid, called, or lately were called, the priories and possessions of aliens, lately belonging or appertaining to any religious house or houses in the said parts beyond the seas, which any person or persons holds, hath, or occupies, hold, have, or occupy, for term of life by the curtesy of *England*, or in dower, or in fee-tail, or otherwise for term of years, of our own grant or demise, or of the grant or demise of any of our progenitors, and which, by or after the decease of the said person or persons, or of any other person, or by any other means, may and ought to come, fall, revert, or remain, to and in our hands, or the hands of our heirs, to the said archbishop, bishops, earl, *John, Thomas, Richard, Adam, John, James,* and *William*, their heirs and assigns, from the feast aforesaid for ever, of us and our heirs, by fealty only for all services, exactions, and demands.

And this, though express mention is not made in these presents of the real yearly value of all and singular the premises, or any of them, or of any gifts and grants heretofore made to the said archbishop, bishops, earl, *John, Thomas, Richard, Adam, John, James,* and *William*, or any of them, by us or any of our progenitors, or any statute, ordinance, or provision, heretofore to the contrary published, ordained, or provided, notwithstanding.

In witness, &c. — Witness the king, at his castle of *Windsor*, the twelfth day of *September*.

By the king himself, and of the date aforesaid, by the authority of parliament.

[21]

Stat. 27 H. VIII. c. 20. A. D. 1535.

For Tithes to be paid throughout this Realm.

This statute
is confirmed
and enlarged
by 2 & 3
Ed. 6. c. 13.

‘ FORASMUCH as divers numbers of evil-disposed persons inhabited in sundry counties, cities, towns, and places of this realm, having no respect to their duties to Almighty God, but against right and good conscience having attempted to subtract and withhold in some places the whole, and in some places great parts of their tithes and oblations, as well personal as predial, due unto God and holy church; and, pursuing such their detestable enormities and injuries, have attempted in late time past to disobey, contemn, and despise the process, laws, and decrees of the ecclesiastical court of this realm, in more temerous and larger manner than before this time hath been seen: for reformation of which injuries, and for unity and peace to be preserved amongst the king’s subjects of this realm, our sovereign lord the king, being supreme head on earth (under God) of the church of *England*, willing the spiritual rights and duties of that church to be preserved, continued, and maintained,’ hath ordained and enacted

by authority of this present parliament, that every of his subjects of this realm of *England, Ireland, Wales, and Calcis*, and marches of the same, according to the ecclesiastical laws and ordinances of his church of *England*, and after the laudable uses and customs of the parish, or other place where he dwelleth or occupieth, shall yield and pay his tithes and offerings, and other duties of holy church; and that for such subtractions of any of the said tithes and offerings, or other duties, the parson, vicar, curate, or other party in that behalf grieved, may, by due process of the king's ecclesiastical laws of the church of *England*, convent the person or persons offending before his ordinary, or other competent judge of this realm, having authority to hear and determine the right of tithes, as also to compel the same person or persons offending to do and yield their said duties in that behalf. And in case the ordinary of the diocese, or his commissary, or the archdeacon or his official, or any other competent judge aforesaid, for any contempt, contumacy, disobedience, or other misdemeanor of the party defendant, make information and request to any of the king's most honourable council, or to the justices of the peace of the shire where such offender dwelleth, to assist and aid the same ordinary, commissary, archdeacon, official, or judge, to order or reform any such person in any cause before rehearsed; that then he of the king's said honourable council, or such two justices of peace, whereof the one to be of the *quorum*, to whom such information or request shall be made, shall have full power and authority, by virtue of this act, to attach or cause to be attached, the person or persons against whom such information or request shall be made, and to commit the same person or persons to ward, there to remain without bail and mainprize, till that he or they shall have found sufficient surety, to be bound by recognizance or otherwise before the king's said councillor, or justice of peace, or any other like councillor, or justice of peace, to the use of our said sovereign lord the king, to give due obedience to the process, proceedings, decrees, and sentences of the ecclesiastical court of this realm, wherein such suit or matter for the premises shall depend or be. And that every of the king's said councillors, or two justices of the peace, whereof the one to be of the *quorum*, as is aforesaid, shall have full power and authority, by virtue of this act, to take, receive, and record recognizances and obligations in any of the causes above written.

II. Provided alway, that this act, or any thing therein contained, shall not extend to any inhabitant of the city of *London*, for or concerning any manner of tithe, offering, or other ecclesiastical duty, grown and due, to be paid or yelden within the same city, because there is another order made for the payment of tithes and other duties within the said city.

1535.

Tithes shall be paid according to the custom of the parish where they be due.

The offender, in subtracting of tithes, shall be convented before the ordinary.

[22]

The offender shall be bound by two justices of peace, &c. to obey the ordinary's sentence.

This act shall not extend to the citizens of *London*.

1535.
Every person shall have his demand and defence according to the laws ecclesiastical.

III. Provided also, that every person or persons, being party or parties to any such suit, shall and may make and have his and their lawful action, demand, or prosecution, appeals, prohibitions, and all other their lawful defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm, in as ample and liberal manner and form as they or any of them might have had, if this act had never been made; any thing in this act above written notwithstanding.

25 H. 8.
c. 19. s. 7.
13 Car. 2.
stat. 1. c. 12.
s. 5.

IV. Provided always, and be it enacted by authority aforesaid, that this act for recovering of tithes, ne any thing therein contained, shall take force and effect but only until such time as the king's highness, and such other xxxii persons which his highness shall name and appoint for the making and establishing of such laws as his highness shall affirm and ratify, to be called the ecclesiastical laws of the church of *England*; and after the said laws so ratified and confirmed as is aforesaid, that then the said tithes to be paid to every ecclesiastical person according to such laws, and none otherwise.

[23]
32 H. 8.
c. 7.

Stat. 27 H. VIII. c. 28. A.D. 1535.

All Monasteries given to the King, which have not Lands above Two Hundred Pounds by the Year. *

‘ FORASMUCH as manifest, fynne, vicious, carnal, and abominable
‘ living is dayly used and committed commonly in such little and

* Bishop *Burnet*, after taking notice of the act for the suppression of the lesser monasteries, and stating the substance or bearing of the preamble, proceeds thus: “ The lord *Herbert* thinks it “ strange, that the statute in the printed book has “ no preamble, but begins bluntly. *Fuller* tells “ us, that he wonders that the lord did not see the “ record, and he sets down the preamble, and says, “ *the rest follow as in the printed statute, chap. 27th*, “ by a mistake for the 28th; this shews, that nei- “ ther the one nor the other ever looked on the “ record; for there is a particular statute of dis- “ solutions distinct from the 28th chapter; and “ the preamble which *Fuller* sets down, belongs “ not to the 28th chapter, as he says, but to the “ 18th chapter, which was never printed, and the “ 28th relates in the preamble to that other statute, “ which had given these monasteries to the king.” (*Hist. of the Reformation*, vol. i. p. 193.) It is to be regretted, that the right reverend historian did not tell us by what means he acquired this extraordinary information, which he has so confidently delivered; whether he depends upon hear- say only, or speaks from his own knowledge, having himself actually seen and examined the records to which he alludes. The passing of two acts for the same purpose, and to the same effect, in the same session, is neither usual nor par- liamentary, and is the more strange at a time

when it was the practice to pass all the bills of a session into a law on the same day, that is, not to give the royal assent to any bill till the last day of the session; a practice which originated in a no- tion that the giving of the royal assent determined the session. I have examined the rolls of parlia- ment for this year in the parliament office, and I find no other act upon the rolls, but that which is commonly received as the 28th chapter, which is set out in the text, and has that very same pream- ble which Mr. *Fuller* has given. (*Ch. Hist.* p. 310.) That a preamble, which appears upon the roll to one act, should, in truth, belong to another; that there should be no trace or vestige of that other act in the repository where it ought to be found; no chasm in the numbers upon the roll; nothing to excite or to lead inquiry: all these things, added to the strange irregularity in the proceeding itself, which has been already noticed, throw such an air of improbability over this story, that it is impossi- ble to credit it, supported, as it is, by no better authority than the simple assertion of so easy and credulous a writer as bishop *Burnet*. Though then Mr. *Fuller* did not see these two statutes which the bishop had the good fortune to discover, yet there can be little doubt, but that Mr. *Fuller* had seen that statute which now appears upon the rolls, (and which should seem to be the only one that ever was there), and that he had seen the re-

' small abbeys, priories, and other religious houses of monks, 1535.
 ' canons, and nuns, where the congregation of such religious per-
 ' sons is under the number of twelve persons, whereby the go- [24]
 ' vernors of such religious houses, and their covent, spoyle, dys-
 ' troye, consume, and utterly waste, as well their churches, monas-
 ' teries, priories, principal houses, farms, granges, lands, tene-
 ' ments, and hereditaments, as the ornaments of their churches,
 ' and their goods and chatells, to the high displeasure of Almighty
 ' God, slander of good religion, and to the great infamy of the
 ' king's highness and the realm, if redress should not be had
 ' thereof. And albeit that many continual visitations hath been
 ' heretofore had, by the space of two hundred years and more, for
 ' an honest and charitable reformation of such unthrifty, carnal,
 ' and abominable living, yet neverthelesse little or none amend-
 ' ment is hitherto had, but their vicious living shamelessly in- [25]
 ' creaseth and augmenteth, and by a cursed custom so rooted and
 ' infected, that a great multitude of the religious persons in such
 ' small houses do rather choose to rove abroad in apostasy, than
 ' to conform themselves to the observation of good religion; so
 ' that without such small houses be utterly suppressed, and the
 ' religious persons therein committed to great and honourable mo-

record itself, and that he extracted the preamble from it; for the number which the statute bears upon the roll is 57, (the numerical arrangement upon the roll not agreeing with that in the printed books, because the publick and private acts are kept distinct and separate in the latter, whereas on the former they are reckoned together as they were passed), and the figure 5 might have been changed into 2, by an easy mistake of the printer or the copyist. Besides, in all the earlier compilations of the statutes, in the "published books" whence my lord *Herbert* acknowledges that he took his notion of the act, it has no preamble, but "begins bluntly." Indeed the act, as given by *Rastell* and *Pulton*, not only wants the preamble, but is imperfect in other parts. *Pulton* gives no more than the first three sections, and *Rastell* entirely omits the proviso in the 5th section, and the whole of the 6th section. Nor has either of these compilers marked the chapter, or made any mention at all of a chapter, so that it should seem as if they had transcribed the act into their books from the paper roll which they might possibly find in the office, that is, from the draught of the bill as it was originally brought into the house, before it went into a committee, and received all those clauses which it now bears. The act they have printed being the same, as far as it goes, with the act upon the roll, this should appear to be no very improbable conjecture; and we are unfortunately left merely to conjecture, as the journals for this year are lost, so that we cannot trace the progress of the bill through the houses, nor see

what additions or alterations were made in it. It is remarkable, that the statute which was passed this session for erecting the court of augmentations, and which *takes notice in its preamble of the statute of dissolutions*, is yet placed before this latter statute, both in the printed books and on the rolls, it being chapter 27 in the printed books, and No. 25. on the rolls. This inversion in the order, no doubt, happened from a blunder of the clerk, when the bills came to receive the royal assent; but it is very probable, that the statute for erecting the court of augmentations, may be that which the bishop alludes to as "relating in its preamble to that other statute, which had given these monasteries to the king." His lordship did not always stay to examine things thoroughly; he was generally in haste; he admits that he wrote this volume of his History in haste; though he somewhat oddly confirms it. (Introduction to vol. iii. of the Hist. of the Reform.) His son, the late Mr. Justice *Burnet*, used to say, it was written in so short a time as six weeks. Extreme accuracy in matters of fact is not to be expected in such a writer, any more than a very nice attention in his composition, "to the circumstances of grammar and propriety."—I have spoken with the greater confidence as to the records in the parliament-office, because I was assisted in my researches there by the clerk of the parliament, *Henry Couper*, esq. who left nothing unexamined, in order to satisfy my inquiries, and whose polite attentions I am proud thus publicly to acknowledge.

1535.

All monas-
teries given
to the king,
which have
not above
two hun-
dred pounds
lands.

[26]

The king
shall have
all monas-

‘ nasteries of religion in this realm, where they may be compelled
‘ to live religiously, for reformation of their lives, the same else be
‘ no redress nor reformation in that behalf. In consideration
‘ whereof, the king’s most royal majesty, being supreme head on
‘ earth, under God, of the church of *England*, dayly studying and
‘ devysing the increase, advancement, and exaltacion of true doc-
‘ trine and virtue in the said church, to the only glory and honour
‘ of God, and the total extirping and dystuction of vice and sin,
‘ having knowledge that the premises be true, as well by the
‘ accompts of his late visitations, as by sundry credible inform-
‘ ations, considering also that diverse and great solemn monas-
‘ teries of this realm, wherein (thanks to God) religion is right
‘ well kept and observed, be destitute of such full number of
‘ religious persons, as they ought and may keep, hath thought
‘ good, that a plain declaration should be made of the premises,
‘ as well to the lords spiritual and temporal, as to other his loving
‘ subjects the commons in this present parliament assembled :
‘ whereupon the said lords and commons, by a great deliberation,
‘ finally be resolved, that it is and shall be much more to the plea-
‘ sure of Almighty God, and for the honour of this his realm,
‘ that the possessions of such small religious houses, now being
‘ spent, spoiled, and wasted for increase and maintenance of sin,
‘ should be used and committed to better uses, and the unthrifty
‘ religious persons, so spending the same, to be compelled to re-
‘ form their lives : And thereupon most humbly desire the king’s
‘ highness that it may be enacted by authority of this present par-
‘ liament,’ that his majesty shall have and enjoy to him and his
‘ heirs for ever, all and singular such monasteries, priories, and
‘ other religious houses of monks, canons, and nuns, of what kinds
‘ of diversities of habits, rules, or order soever they be called or
‘ named, which have not in lands, tenements, rents, tithes, portions,
‘ and other hereditaments, above the clear yearly value of two hun-
‘ dred pounds. And in like manner shall have and enjoy all the
‘ sites and circuits of every such religious houses, and all and singu-
‘ lar the manors, granges, meases, lands, tenements, rents, rever-
‘ sions, services, tithes, pensions, portions, churches, chapels, ad-
‘ vowsons, patronages, annuities, rights, entries, conditions, and
‘ other hereditaments appertaining or belonging to every such mo-
‘ nastery, priory, or other religious house, not having, as is afore-
‘ said, above the said clear yearly value of two hundred pounds, in
‘ as large and ample manner as the abbots, priors, abbesses, pri-
‘ oresses, and other governors of such monasteries, priories, and
‘ other religious houses now have, or ought to have the same in the
‘ right of their houses. And that also his highness shall have to
‘ him and to his heirs all and singular such monasteries, abbies, and

priorities, which at any time within one year next before the making of this act hath been given and granted to his majesty by any abbot, prior, abbess, or prioress, under their covent seal, or that otherwise hath been suppressed or dissolved, and all and singular the manors, lands, tenements, rents, services, reversions, tithes, pensions, portions, churches, chapels, advowsons, patronages, rights, entries, conditions, and all other interests and hereditaments to the same monasteries, abbeys, and priorities, or to any of them appertaining or belonging; to have and to hold all and singular the premises, with all their rights, profits, jurisdictions, and commodities, unto the king's majesty, and his heirs and assigns for ever, to do and use therewith his and their own wills, to the pleasure of Almighty God, and to the honour and profit of this realm.

1535.

teries before
assured to
him, or that
have been
suppressed.

II. And it is ordained and enacted by the authority aforesaid, that all and every person and persons, and bodies politick, which now have, or hereafter shall have, any letters patents of the king's highness, of any of the sites, circuits, manors, lands, tenements, rents, reversions, services, tithes, pensions, portions, churches, chapels, advowsons, patronages, tithes, entries, conditions, interests, or other hereditaments, which appertained to any monasteries, abbeys, or priorities, heretofore given or granted to the king's highness, or otherwise suppressed or dissolved, or which appertaineth to any of the monasteries, abbeys, priorities, or other religious houses, that shall be suppressed or dissolved by the authority of this act, shall have and enjoy the said sites, circuits, manors, lands, tenements, rents, reversions, services, tithes, pensions, portions, churches, chapels, advowsons, patronages, tithes, entries, conditions, interests, and all other hereditaments, contained and specified in their letters patents now being thereof made, and to be contained and expressed in any letters patents hereafter to be made, according to the tenour, purport, and effect of any such letters patents; and shall also have all such actions, suits, entries, and remedies, to all intents and purposes, for any thing and things contained in every such letters patents now made, or to be contained in any such letters hereafter to be made, in like manner, form, and conditions, as the abbots, priors, abbesses, prioresses, and other chief governors of any religious houses which had the same, might or ought to have had, if they had not been suppressed or dissolved.

They shall
enjoy those
abbey lands
to whom
the king
hath given
them.

[27]

III. Saving to every person and persons, and bodies politick, their heirs and successors, (other than the abbots, priors, abbesses, prioresses, and other chief governors of the said religious houses specified in this act, and the covents of the same, and their successors, and such as pretend to be founders, patrons, or donors of

A saving of
the right of
others.

1535. such religious houses, of any lands, tenements, or hereditaments, belonging to the same, and their heirs and successors,) all such right, title, interest, possessions, leases for years, rents, services, annuities, commodities, fees, offices, liberties, and livings, pensions, portions, corrodies, synodics, proxies, and all other profits as they or any of them hath, ought, or might have had in or to any of the said monasteries, abbies, priories, or other religious houses, or in or to any manors, lands, tenements, rents, reversions, tithes, pensions, portions, or other hereditaments appertaining or belonging, or that appertained to any of the said monasteries, priories, or other religious houses, as if the same monasteries, priories, or other religious houses had not been suppressed by this act, but had continued in their essential bodies and states that they now be, or were in.

Fraudulent
assurances
made by
governors
of houses
before their
dissolu-
tions, shall
be void.

IV. Provided always, and be it enacted, that forasmuch as divers of the chief governors of such religious houses, determining the utter spoil and destruction of their houses, and dreading the suppressing thereof, for the maintenance of their detestable lives, have lately fraudulently and craftily made feoffments, estates, gifts, grants, and leases, under the covent seals, or suffered recoveries of their manors, lands, tenements, and hereditaments, in fee-simple, fee-tail, for term of life or lives, or for years, or charged the same with rents, or corrodies, to the great decay and diminution of the houses; that all such crafty and fraudulent recoveries, feoffments, estates, gifts, grants, and leases, and every of them, made by any of the said chief governors of such religious houses, under their covent seals, within one year next before the making of this act, shall be utterly void and of none effect: Provided always, that such person and persons as have leases for term of life, or years, [28] whereupon is reserved the old rents and forms accustomed, and such as have any offices, fees, or corrodies, that have been accustomed or used in such religious houses, and have bought any livery or living in any such houses, shall have and enjoy their said leases, offices, fees, corrodies, liberties, liveries, and livings, as if this act had never been made.

Ornaments,
jewels,
goods, chat-
tels, debts
of monas-
teries, given
to the king.

V. And it is further enacted by authority aforesaid, that the king's highness shall have and enjoy to his own proper use, all such ornaments, jewels, goods, chattels, and debts, which appertained or belonged to any of the chief governors of the said monasteries, or religious houses, in the right of their said monasteries or houses, at the first day of *March* in the year of our Lord God 1535, or any time sithen whensoever, and to whose possession soever they shall come, or be found, except only such beasts, grain, and woods, and such other like chattel and revenues as have been sold before the said first day of *March*, or sithen, for the necessary

or reasonable expences or charges of any of the said monasteries or houses. 1535.

Provided alwayes, that such of the said chief governors which have been elect, or made abbots, priors, abbesses, or prioresses, of any of the said religious houses sithen the first day of *January* which was in the year of our Lord God 1534, and by reason thereof be bounden to pay the first-fruits to the king's highness, at days to come, limited by their bonds made for the same, that in every such case such chief governors, and their sureties, or any of them, shall be clearly discharged by authority of this act, against the king's highness, and all other persons, for the payment of such sums of money as they stand bounden to pay for the said first-fruits, or for any part thereof: and forasmuch as the clear yearly value of all the said monasteries, priories, and other religious houses in this realm, is certified into the king's exchequer, amongst the books of the yearly valuation of all the spiritual possessions of this realm, amongst which shall and may appear the certainty and number of such small and little religious houses, as have not in lands, tenements, rents, tythes, portions, and other hereditaments, above the said clear yearly value of two hundred pounds:

VI. Be it therefore enacted by authority aforesaid, that the king's highness shall have and enjoy according to this act, the actual and real possession of all and singular such monasteries, priories, and other religious houses, as shall appear by the said certificate remaining in the king's exchequer, not to have in lands, tenements, rents, tithes, portions, and other hereditaments, above the said clear yearly value of two hundred pounds, so that his highness may lawfully give, grant, and dispose them, or any of them, at his will and pleasure, to the honour of God, and the wealth of this realm, without farther inquisitions or offices to be had or found for the same.

The king shall have the actual possession of the abbey lands.

[29]

In consideration of which premises to be had to his highness, and to his heirs, as is aforesaid, his majesty is pleased and contented of his most excellent charity, to provide to every chief head and governor of every such religious house, during their lives, such yearly pensions and benefices as for their degrees and qualities shall be reasonable and convenient, wherein his highness will have most tender respect to such of the said chief governors as well and truly preserve and keep the goods and ornaments of their houses, to the use of his grace, without spoil, waste, or embezzling the same; and also his majesty will ordain and provide, that the covents of every such religious house shall have their capacities, if they will, to live honestly and virtuously abroad, and some convenient charity disposed to them towards their living,

1535.

or else shall be committed to such honourable great monasteries of this realm wherein good religion is observed, as shall be limited by his highness, there to live religiously during their lives; and it is ordained by the authority aforesaid, that the chief governors and covents of such honourable great monasteries shall take and accept into their houses, from time to time, such number of the persons of the said covents as shall be assigned and appointed by the king's highness, and keep them religiously, during their lives, within their said monasteries, in like manner and form as the covents of such great monasteries be ordered and kept.

[30]

Provided always, that all archbishops, bishops, and other persons which be or shall be chargeable to and for the collection of the tenths granted, and going out of the spiritual possessions of this realm, shall be discharged and acquitted of and for such parts and portions of the said tenths wherewith the said houses of religion, suppressed and dissolved by this act, were charged or chargeable to the king's highness, except of such sums of money thereof, as they, or any of them have, or shall have received for the said tenths, of the chief governors of such religious houses: Provided also, that where the clergy of the province of *Canterbury* stood, and be indebted to the king's highness in great sums of money, remaining yet unpaid, of the rest of a hundred thousand pounds granted and given to his grace in their convocation, towards the payment whereof the said religious houses should have been contributory if they had not been suppressed by this act; and also some of the governors of the said religious houses have been collectors for levying of the said debt, and have received thereof great sums of money yet remaining in their hands; the king's most royal majesty is pleased and contented to deduct, abate, release, and defalk, to the said clergy, of the said rest yet unpaid, as well such sums of money as any the chief governors of such religious houses hath received, and not paid, as so much money as every of the said religious houses, suppressed by this act, were rated and taxed to pay in any one year, to and for the payment of the said hundred thousand pounds; and also the king's majesty is pleased and contented, that it be enacted by authority aforesaid, that his highness shall satisfy, content, and pay, all and singular such just and true debts which be owing to any person or persons by the chief governors of any the said religious houses, in as large and ample manner as the said chief governors should or ought to have done if this act had never been made; Provided always, that the king's highness, at any time after the making of this act, may at his pleasure ordain and declare, by his letters patent under his great seal, that such of the said religious houses which his highness shall not be disposed

to have suppressed nor dissolved by authority of this act, shall still continue, remain, and be in the same body corporate, and in the said essential estate, quality, and condition, as well in possessions as otherwise, as they were afore the making of this act, without any suppression or dissolution thereof, or of any part of the same, by the authority of this act; and that every such ordinance and declaration, so to be made by the king's highness, shall be good and effectual to the chief governors of such religious houses which his majesty will not have suppressed, and to their successors, according to the tenors and purports of the letters patents thereof to be made, any thing or things contained in this act to the contrary hereof notwithstanding: Provided also, that where the clergy of the province of *York* stood, and be indebted to the king's highness in great sums of money yet unpaid, of the rest of such sums of money which was granted by them to his majesty in their convocation, towards the payment whereof the religious houses that shall be suppressed and dissolved by this act, being within the same province, should have been contributory if they had not been dissolved, and also some of the governors of the said religious houses within the said province, that shall be suppressed by this act, have been collectors for levying of part of the said sums of money granted to the king's highness, as is aforesaid, and have certain sums thereof in their hands yet unpaid, the king's majesty is pleased and contented to deduct, abate, release, and defalk to the said clergy of the said province of *York*, of the rest of their said debt yet unpaid, as well such of the said sums of money, as any chief governors of any religious houses within the same province, that shall be suppressed by this act, hath been collected, and not paid, as so much money as every of the said religious houses, suppressed by this act, were rated and taxed to pay in any one year, towards the payment of the said sums of money granted to the king's highness.

1535.

[31]

VII. Provided always, that this act, or any thing or things therein contained, shall not extend, nor be prejudicial to any abbots or priors of any monasteries or priories being certified into the king's exchequer to have in possessions and profits spiritual and temporal, above the clear yearly value of two hundred pounds, for or concerning such cells of religious houses, appertaining or belonging to their monasteries or priories, in which cells the priors, or other chief governors thereof, be under the obedience of the abbots or priors to whom such cells belong, as the monks or canons of the covent of their monasteries or priories, and cannot sue, nor be sued, by the laws of this realm, in or by their own proper names, for the possession, or other things appertaining to such cells whereof they be priors or governors, but must sue and be sued in and by

A proviso
for the cells
of other
monaste-
ries being
under obe-
dience.

1535. the names of the abbots or priors to whom they be obediencers, and to whom such cells belong; and also be priors or governors dative, and removable from time to time, and accountants of the profits of such cells, at the only pleasure and will of the abbots or priors to whom such cells belong; but that every such cell shall be and remain undissolved in the same estate, quality, and condition, as if this act had never been made; any thing in this act to the contrary hereof notwithstanding.

The right
of founders
and patrons
saved.

[32]

VIII. Saving always, and reserving unto every person and persons, being founders, patrons, or donors of any abbies, priories, or other religious houses, that shall be suppressed by this act, their heirs and successors, all such right, title, interest, possession, rents, annuities, fees, offices, leases, commons, and all other profits whatsoever, which any of them have, or should have had, without fraud or covin, by any manner of means, otherwise than by reason or occasion of the dissolution of the said abbies, priories, or other religious houses, in, to, or upon any the said abbies, priories, or other religious houses, whereof they be founders, patrons, or donors, or in, to, or upon any the lands, tenements, or other hereditaments, appertaining or belonging to the same, in like manner, form, and condition as other persons and bodies politick be saved by this act, as is afore rehearsed, and as if the said abbies, priories, or other religious houses, had not been suppressed and dissolved by this act, but had continued still in their essential bodies and estates as they be now in, any thing in this act to the contrary hereof notwithstanding.

Stat. 28 H. VIII. c. 11. A.D. 1536.

For the Restitution of the First-fruits in Time of Vacation to the next Incumbent.

The reasons
for making
this act.

‘ FORASMUCH as in the statute of the payment unto the king’s majesty, his heirs and successors, of the first-fruits of spiritual promotions, offices, benefices, and dignities, within this realm, and other the king’s dominions, express mention and declaration is not had ne made, from what time the year shall be accounted, in which the first-fruits shall be due and payable to his highness, that is to wit, whether immediately from the death, resignation, or deprivation of every incumbent, or from the time of admission or new taking of possession in every such promotion.

‘ II. And also by reason that in the same statute it is not declared who shall have the fruits, tithes, and other profits of the said benefices, offices, promotions, and dignities spiritual, during the time of vacation thereof, divers of the archbishops and bishops of this realm have, not only when the time of perceiving and taking of tithes, (that is to say, wool, lamb, corn, and hay, and

‘ tithes usually paid at the holy time of *Easter*) hath approached,
 ‘ deferred the collation of such benefices as have been of their own
 ‘ patronage, but also have, upon presentations of clerks made unto
 ‘ them by the just patrons, protracted and deferred to institute,
 ‘ induct, and admit the same clerks, to the intent that they might
 ‘ have and perceive to their own use the same tithes growing
 ‘ during the vacation; so that through such delays (over and above
 ‘ the first-fruits, which be justly due to the king’s highness) they
 ‘ have been constrained also to lose all or the most part of one
 ‘ year’s profits of their benefices and promotions, and to serve the
 ‘ cure at their and their friends proper costs and charges, or utterly
 ‘ to forsake and give over their benefices and promotions, to their
 ‘ great loss and hindrance.’

1536.

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III. For reformation whereof, be it ordained and enacted by the king our sovereign lord, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the said year, in which the first-fruits shall be paid to the king’s grace, shall begin and be accounted immediately after the avoidance or vacation of any such benefice or promotions spiritual afore rehearsed; and that the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, offering or belonging to any archdeaconry, deanery, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chauntries only except), within this realm, or other the king’s dominions, growing, rising, or coming, during the time of vacation of the same promotion spiritual, shall belong and affere to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, and to his executors, towards the payment of the first-fruits to the king’s highness, his heirs and successors; any usage, custom, liberty, privilege, or prescription, to the contrary had, used, or being, in anywise notwithstanding.

The time from which first-fruits are due to the king.

Fruits taken during the vacation of a benefice, shall be restored to the next incumbent.

IV. And it is also enacted by the authority aforesaid, that if any archbishop, bishop, archdeacon, ordinary, or any other person or persons to their uses and behoof, at any time heretofore sith the first day of *May* last past, have perceived, received, or taken, or at any time hereafter do perceive, receive, or take, the fruits, tithes, obventions, oblations, emoluments, commodities, revenues, rents, advantages, profits, or casualties, coming, growing, or belonging, or which hereafter shall come, grow, affere, or belong, to any archdeaconry, deanery, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chauntries only excepted), within this realm, or other the king’s dominions, during the vacation of such arch-

The forfeiture of the ordinary who receiveth the fruits of a benefice during the vacation, and doth not restore them to the next incumbent.

1536. deaconry, deanery, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chauntries only excepted), and the same, upon reasonable request from henceforth to be made, doth not render, restore, satisfy, content, and pay to the next incumbent, being lawfully instituted, inducted, or admitted to such archdeaconry, deanery, prebend, parsonage, or vicarage, or other promotion, benefice, dignity, or office spiritual, except before excepted, or do let or interrupt the said incumbent to have the same: that then every archbishop, bishop, archdeacon, ordinary, or other person so doing, shall forfeit and lose the treble value of so much as he shall then have received of the fruits of every prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, whereof he so shall perceive, receive or detain, let or interrupt the incumbent to perceive receive, and have the fruits, tithes, obventions, oblations, emoluments, commodities, revenues, rents, advantages, profits, or casualties; the moiety of which forfeiture shall be to the king our sovereign lord, and the other moiety thereof to the incumbent of the same prebend, parsonage, or vicarage, or other spiritual promotion, to be recovered in any of the king's courts, by action, bill, plaint, information, or otherwise, in which action or suit the defendant shall not be admitted to wage his law, nor any protection or essoin shall be unto the defendant allowed.

What part of the fruits of a benefice the ordinary may retain in his hands, and for what causes.

V. Provided always, that it shall be lawful to every archbishop, bishop, archdeacon. and ordinary, their officers and ministers, to retain in his or their custody so much of the tithes, fruits, obventions, oblations, emoluments, commodities, advantages, rents, revenues, casualties, and profits, as shall amount to pay unto such person or persons, as hath or shall serve or keep the cure of such archdeaconry, deanery, prebend, parsonage, or vicarage, or other spiritual promotion, during the vacation, his or their reasonable stipend or salary; and also for the collection, gathering, and levying of such tithes, fruits, emoluments, rents, and other profits rising and growing during the vacation aforesaid; any thing in this act contained to the contrary in anywise notwithstanding.

Incumbents may declare their wills of any corn sown by them upon their glebe lands.

VI. Provided also, and be it further enacted by the authority aforesaid, that in case any of the incumbents aforesaid happen to die, and before his death have caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain; that then, in that case, all and every of the same incumbents may make and declare their testaments of all the profits of the corn growing upon the said glebe lands so manured and sown; any thing contained in this present act in anywise notwithstanding.

Stat. 31 H. VIII. c. 13. A.D. 1539.

1539.

An Act for Dissolution of Monasteries and Abbies.

‘ WHERE divers and sundry abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses of divers monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places within this our sovereign lord the king’s realm of *England* and *Wales*, of their own free and voluntary minds, good wills, and assents, without constraint, coercion, or compulsion of any manner of person or persons, sithen the fourth day of *February*, the twenty-seventh year of the reign of our now most dread sovereign lord, by the due order and course of the common laws of this his realm of *England*, and by their sufficient writings of record under their covent and common seals, have severally given, granted, and by the same their writings severally confirmed all their said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, and all their sites, circuits, and precincts of the same, and all and singular their manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, woods, tithes, pensions, portions, churches, chapels, advowsons, patronages, annuities, rights, entries, conditions, commons, leets, courts, liberties, privileges, and franchises, appertaining, or in anywise belonging to any such monastery, abbathy, priory, nunnery, college, hospital, house of friers, and other religious and ecclesiastical houses and places, or to any of them, by whatsoever name or corporation they or any of them were then named or called, and of what order, habit, religion, or other kind or quality soever they or any of them were then reputed, known, or taken; to have and to hold all the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses or places, sites, circuits, precincts, manors, lands, tenements, meadows, pastures, rents, reversions, services, and all other the premises, to our said sovereign lord, his heirs and successors forever, and the same their said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, and other the premises voluntarily, as is aforesaid, have renounced, left and forsaken, and every of them hath renounced, left, and forsaken:’

How leases made of manors belonging to monasteries dissolved and assured to the king shall take effect.

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II. Be it therefore enacted by the king our sovereign lord, and the lords spiritual and temporal, and the commons, in this present

Monasteries and their lands

1539. parliament assembled, and by authority of the same, that the king our sovereign lord shall have, hold, possess, and enjoy to him, his heirs and successors for ever, all and singular such late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, of what kinds, natures, qualities, or diversities of habits, rules, professions, or orders, they or any of them were named, known, or called, which sith the fourth day of *February*, the twenty-seventh year of the reign of our said sovereign lord, have been dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to his highness, and by the same authority, and in like manner shall have, hold, possess, and enjoy all the sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, woods, tithes, pensions, portions, parsonages appropriated, vicarages, churches, chapels, advowsons, nominations, patronages, annuities, rights, interests, entries, conditions, commons, leets, courts, liberties, privileges, franchises, and other whatsoever hereditaments, which appertained or belonged to the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, or to any of them, in as large and ample manner and form as the late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses of such late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, had, held, or occupied, or of right ought to have had, holden, or occupied in the right of their said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses and places, at the time of the said dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or by any other manner of mean coming of the same to the king's highness sithen the fourth day of *February* above specified.

before surrendered or dissolved, given to the king.

All houses to be dissolved, and their lands given to the king.

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III. And it is further enacted by the authority aforesaid, that not only all the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, and all other the premises, forthwith, immediately, and presently, but also all other monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and all other religious and ecclesiastical houses and places, which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to the king's highness; and also all the sites, circuits, precincts, manors, lordships,

granges, meases, lands, tenements, meadows, pastures, rents, re-versions, services, woods, tithes, pensions, portions, parsonages appropriate, vicarages, churches, chapels, advowsons, nominations, patronages, annuities, rights, interests, entries, conditions, commons, leets, courts, liberties, privileges, franchises, and other hereditaments, whatsoever they be, belonging or appertaining to the same, or any of them, whensoever, and as soon as they shall be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come unto the king's highness, shall be vested, deemed, and adjudged by authority of this present parliament, in the very actual and real seisin and possession of the king our sovereign lord, his heirs and successors, for ever, in the state and condition as they now be, and as though all the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and all other religious and ecclesiastical houses and places so dissolved, suppressed, renounced, relinquished, forfeited, given up, or come unto the king's highness, as is aforesaid, as also the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or come unto the king's highness, sites, circuits, precincts, manors, lordships, granges, lands, tenements, and other the premises, whatsoever they be, and every of them, were in this present act specially and particularly rehearsed, named, and expressed by express words, names, titles, and faculties, and in their natures, kinds, and qualities.

1539.

The sites and lands of the monasteries shall be in the actual possession of the king.

XIV. Provided also, and be it further enacted by the authority aforesaid, that all and every person and persons, their heirs and assigns, which sithen the said fourth day of *February*, by licence, pardon, confirmation, release, assent, or consent, of our said sovereign lord the king, under his great seal heretofore given, had, or made, or hereafter to be had or made, have obtained or purchased by indenture, fine, feoffment, recovery, or otherwise, of the said late abbots, priors, abbesses, prioresses, or other governors or governesses of any such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses or places, any monasteries, priories, colleges, hospitals, manors, lands, tenements, meadows, pastures, woods, churches, chapels, parsonages, tithes, pensions, portions, or other hereditaments, shall have and enjoy the same, according to such writings and assurances as been thereof before the first day of this present parliament, or hereafter shall be, had or made :

Assurance to others by the king's licence of any abbey lands.

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XV. Saving to all and every person and persons, and bodies politick, their heirs and successors, and the heirs and successors of every of them, (other than the said late abbots, abbesses, priors,

A saving of the right of others accrued unto

1539.
them before
the said
purchase.

prioresses, and other governors and governesses, and their successors, and the successors of every of them, and such as pretend to be founders, patrons, or donors of the monasteries, abbathies, priories, nunneries, colleges, hospitals, and other religious or ecclesiastical houses or places, or of any of them, or of any manors, messuages, lands, tenements, or other hereditaments, late belonging to the same, or to any of them, and their heirs, successors, and the heirs and successors of every such founder, patron, or donor, all such right, title, interest, possession, rents, annuities, commodities, offices, fees, liveries, and livings, portions, pensions, corrodi- dies, synods, proxies, or other profits, which they or any of them have, ought, or might have had, in or to any of the said monasteries, abbathies, priories, colleges, hospitals, manors, lands, tenements, rents, services, reversions, tithes, pensions, portions, or other hereditaments, at any time before any such purchase, indentures, fines, feoffments, recoveries, or other lawful mean between any such parties had or made, as is above said; this act, or any thing therein contained, to the contrary notwithstanding.

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A confirm-
ation of the
king's pur-
chases made
sithence 4
Febr. Ann.
27 H. 8.

‘ XVI. And where our said sovereign lord, sith the fourth day
‘ of *February*, the said twenty-seventh year of the reign of our
‘ said sovereign lord, hath obtained and purchased, as well by ex-
‘ changes, as by gifts, bargains, fines, sundry feoffments, recoveries,
‘ deeds enrolled, and otherwise, of divers and sundry persons,
‘ many and divers honours, castles, manors, lands, tenements,
‘ meadows, pastures, woods, rents, reversions, services, and other
‘ hereditaments, and hath not only paid divers and sundry great
‘ sums of money for the same, but also hath given and granted for
‘ the same, unto divers and sundry persons, divers and sundry
‘ manors, lands, tenements, and hereditaments, and other recom-
‘ pences in and for full satisfaction of all such honours, castles,
‘ manors, lands, tenements, rents, reversions, services, and other
‘ his hereditaments, by his highness obtained or had, as is above-
‘ said:’ be it therefore enacted by the authority aforesaid, that our
said sovereign lord the king, his heirs and successors, shall have, hold,
possess, and enjoy, all such honours, castles, manors, lands, tene-
ments, and other hereditaments, as his highness sith the said fourth
day of *February*, the twenty-seventh year abovesaid, hath obtained
and had by way of exchange, bargain, purchase, or other whatso-
ever mean or means, according to the true meaning and intent of
his highness’ bargain, exchange, or purchase, misrecital, misnaming,
or nonrecital, or not naming of the said honours, castles, manors,
lands, tenements, and other hereditaments, comprized or mention-
ed in the bargains or writings made between the king’s highness,
and any other party or parties, or of the towns or counties where
the said honours, castles, manors, lands, tenements, and heredita-

ments, lie and been, or any other matter or cause whatsoever it be, 1539.
in anywise notwithstanding.

XVII. Saving to all and every person and persons, and to their heirs, bodies politick and corporate, and to their successors, and to every of them, other than such person and persons, and their heirs and their wives, and the wives of every of them, bodies politick and corporate, and their successors, and every of them, of whom the king's highness hath obtained by exchange, gift, bargain, fine, feoffment, recovery, deed enrolled, or otherwise, any such honours, castles, manors, lands, tenements, and other hereditaments, as is aforesaid, all such right, title, use, interest, possession, rents, charges, annuities, commodities, fees, and other profits, (rents services and rents seck only except), which they, or any of them, have, might, or ought to have had, in or to the premises so obtained and had, or in or to any parcel thereof, if this act had never been had nor made; this present act, or any thing therein contained to the contrary notwithstanding.

A saving of the right of all others, but of the sellers, their heirs and wives.

An exception of rents-services, rents-seck.

XVIII. And where it hath pleased the king's highness of his most abundant grace and goodness, as well upon divers and sundry considerations his majesty specially moving, as also otherwise, to have bargained, sold, changed, or given, and granted by his grace's several letters patents, indentures, or other writings, as well under his highness' great seal, as under the seal of his highness duchy of *Lancaster*, and the seal of the office of the augmentations of his crown, unto divers and sundry of his loving and obedient subjects, divers and sundry honours, castles, manors, monasteries, abbathies, priories, lands, tenements, rents, reversions, services, parsonages appropriate, advowsons, liberties, tithes, oblations, portions, pensions, franchises, privileges, liberties, and other hereditaments, commodities and profits, in fee-simple, fee-tail, for term for life, or for term of years; for avoiding of which letters patents, and of the contents of the same, divers, sundry, and many ambiguities, doubts, and questions might hereafter arise, be moved, and stirred, as well for misrecital or nonrecital, as for divers other matters, things, or causes to be alleged, objected, or invented against the said letters patents, as also for lack of the finding of offices or inquisitions, whereby the title of his highness therein ought to have been found, before the making of the same letters patents, or for misrecital or nonrecital of leases, as well of record, as not of record, or for lack of the certainty of the values, or by reason of misnaming of the honours, castles, manors, monasteries, abbathies, priories, lands, tenements, and other hereditaments comprised and mentioned within the same letters patents, or of the towns and counties where the same honours, castles, manors, monasteries, abbathies,

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1539. 'priors, lands, tenements, rents, and other hereditaments lien
'and been, as for divers and sundry other suggestions and sur-
'mises, which hereafter might happen to be moved, surmised, and
'procured against the same letters patents, albeit the words in
'effect contained in the said letters patents be according to the
'true intent and meaning of his most royal majesty.'

The king's
patents suf-
ficient not-
withstanding
misrecital, not
finding of
offices, &c.
34 & 35 H.
8. c. 21.

[41]

XIX. Be it therefore enacted by the authority of this present parliament, that as well all and every the said letters patents, indentures, and other writings, and every of them, under the seal or seals abovesaid, or of any of them, made or granted by the king's highness sithen the said fourth day of *February*, the said twenty-seventh year of his most noble reign, as all and singular other his grace's letters patents, indentures, or other writings to be had, made, or granted to any person or persons within three years next after the making of this present act, of any honours, castles, manors, monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or of other religious or ecclesiastical houses or places, sites, circuits, precincts, lands, tenements, parsonages, tithes, pensions, portions, advowsons, nominations, and all other hereditaments and possessions, of what kind, nature, or quality soever they be, or by whatsoever name or names they or any of them be named, known, or reputed, shall stand and be good, effectual, and available in the law of this realm, to all respects, purposes, constructions, and intents, against his majesty, his heirs, and successors, without any other licence, dispensation, or tolerance of the king's highness, his heirs, and successors, or of any other person or persons whatsoever they be, for any thing or things contained, or hereafter to be contained, in any such letters patents, indentures, or other writings; any cause, consideration, or thing material, to the contrary in anywise notwithstanding:

A saving of
the right of
others in
the lands
assured by
the king.

XX. Saving to all and singular persons, bodies politick and corporate, their heirs and successors, and the heirs and successors of every of them, (other than his highness, his heirs and successors, and the said governors and governesses, and their successors, donors, founders, and patrons, aforesaid, and their heirs and successors, and all other persons claiming in their rights, or to their use, or in the right or to the use of any of them), all such right, title, claim, interest, possession, reversion, remainder, offices, annuities, rent-charges, and commons, which they or any of them have, ought, or might have had, in or to any of the said honours, castles, manors, monasteries, abbathies, priories, lands, tenements, and other hereditaments in the said letters patents made, or hereafter to be made, comprised at any time before the making of the said such letters patents; this act, or any thing therein contained, to the contrary notwithstanding.

‘ XXI. And where divers and sundry abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, have had, possessed, and enjoyed, divers and sundry parsonages appropriated, tithes, pensions, and portions, and also were acquitted and discharged of and from the payment or payments of tithes, to be paid out of or for their said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, manors, messuages, lands, tenements, and hereditaments :’ be it therefore enacted by the authority abovesaid, that as well the king our sovereign lord, his heirs and successors, as all and every such person and persons, their heirs and assigns, which have, or hereafter shall have any monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other ecclesiastical houses or places, sites, circuits, precincts of the same, or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments, whatsoever they be, which belonged or appertained, or which now belong or appertain unto the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses or places, or unto any of them, shall have, hold, retain, keep, and enjoy, as well the said parsonages appropriate, tithes, pensions, and portions, of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, meases, lands, tenements, and other hereditaments, whatsoever they be, and every of them, according to their estates and titles, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the said late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses, or any of them, had, held, occupied, possessed, used, retained, or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming to the king’s highness of such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious or ecclesiastical houses or places, or at the day of the dissolution, suppression, renouncing, relinquishing, giving up, or coming to the king’s highness of any of them ; this act, or any thing therein contained, to the contrary notwithstanding :

XXII. Saving to the king’s highness, his heirs and successors, all and all manner of rents, services, and other duties whatsoever they be, as if this act had never been had nor made.

1539.

Such abbey lands as before the dissolution of them were discharged of tithes, shall so continue.

[*42]

All rents, services, &c. reserved to the king.

1539.

Monasteries, &c. exempt from visitations and jurisdiction of the ordinary.

[43]

XXIII. And be it further enacted by authority of this present parliament, that such of the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, and all churches and chapels to them, or any of them belonging, which, before the dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming unto the king's highness, were exempted from the visitation or visitations, and all other jurisdiction of the ordinary or ordinaries, within whose diocese they were situate or set, shall from henceforth be within the jurisdiction and visitation of the ordinary or ordinaries, within whose diocese they or any of them be situate and set, or within the jurisdiction and visitation of such person or persons as by the king's highness shall be limited or appointed; this act, or any other exemption, liberty, or jurisdiction to the contrary notwithstanding.

Stat. 32 H. VIII. c. 7. A. D. 1540.

For the true Payment of Tithes and Offerings.

This act is confirmed and enlarged by 2 & 3 Ed. 6. c. 13.

‘ WHERE divers and many persons inhabiting in sundry countries and places of this realm, and other the king's dominions, not regarding their duties to Almighty God, and to the king our sovereign lord, but in few years past more contemptuously and commonly presuming to offend and infringe the good and wholesome laws of this realm, and gracious commandments of our said sovereign lord, than in times past hath been seen or known, have not letted to substract and withdraw the lawful and accustomed tithes, of corn, hay, pasturages, and other sort of tithes and oblations commonly due to the owners, proprietaries, and possessors of the parsonages, vicarages, and other ecclesiastical places of and within the said realm and dominions, being the more encouraged thereto, for that divers of the king's subjects, being lay persons, having parsonages, vicarages, and tithes to them, and to their heirs, or to them, and to their heirs of their bodies, lawfully begotten, or for term of life, or years, cannot by the order and course of the ecclesiastical laws of this realm, sue in any ecclesiastical court for the wrongful withholding and detaining of the said tithes, or other duties, nor cannot by the order of the common laws of this realm have any due remedy against any person or persons, their heirs or assigns, that wrongfully detaineth or withholdeth the same; by occasion whereof much controversy, suit, variance, and discord is like to insurge and ensue among the king's subjects, to the great detriment, damage, and decay of many of them, if convenient and speedy remedy therefore be not had and provided:’

II. Wherefore it is ordained and enacted by our said sovereign lord the king, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That all and singular persons of this his said realm, or other his dominions, of what estate, degree, or condition soever he or they be, shall fully, truly, and effectually divide, set out, yield, or pay, all and singular tithes and offerings aforesaid, according to the lawful customs and usages of parishes and places where such tithes or duties shall grow, arise, come, or be due; and in case that shall happen, any person or persons, of his or their ungodly or perverse will and mind, to detain and withhold any of the said tithes or offerings, or any part or parcel thereof, then the person or persons, being ecclesiastical or lay person, having cause to demand or have the said tithes or offerings, being thereby wronged or grieved, shall and may convent the person or persons so offending before the ordinary, his commissary, or other competent minister, or lawful judge of the place where such wrong shall be done, according to the ecclesiastical laws; and in every such cause or matter of suit, the same ordinary, commissary, or other competent minister, or lawful judge, having the parties, or their lawful procurators, before him or them, shall and may, by virtue of this act, proceed to the examination, hearing, and determination of every such cause or matter ordinarily or summarily, according to the course and process of the said ecclesiastical laws, and thereupon may give sentence accordingly.

1540.

Tithes shall be paid according to the custom of the parish where they be due.

[44]

The offender convented before the ordinary.

III. And in case that any of the parties, for any cause or matter concerning that suit, do appeal from the sentence, order, and definitive judgment of the said ordinary, or other competent judge, as is aforesaid, then the same judge, by virtue of this act, forthwith upon such appellation made, shall adjudge to the other party the reasonable costs of his suit therein before expended, and shall compel the same party appellant to satisfy and pay the same costs so adjudged by compulsory process, and censures of the said laws ecclesiastical, taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if after the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielded; and so every ordinary, or other competent judge ecclesiastical, by virtue of this act shall adjudge costs to the other party upon every appeal to be made in any suit or cause of subtraction, or detention of any tithes, or offerings, or in any other suit to be made for or concerning the duty of such tithes or offerings.

The appellant shall pay costs of suit to the other party.

IV. And further be it enacted by the authority aforesaid, that if any person or persons, after such sentence definitive given

The offender shall be

1540.

bound by
two justices
of peace to
obey the
ordinary's
sentence.

[*45]

against them, obstinately and wilfully refuse for to pay their tithes, or duties, or such sums of money so adjudged, wherein they be condemned for the same, that then two justices of the peace for the same shire, whereof one to be of the quorum, shall have authority * by this act, upon information, certificate, or complaint to them made in writing by the said ecclesiastical judge that gave the same sentence, to cause the same party so refusing to be attached, and committed to the next gaol, and there to remain, without bail or mainprize, till he or they shall have found sufficient sureties to be bound by recognizance, or otherwise, before the same justices, to the use of our sovereign lord the king, to perform the said definitive sentence and judgment.

Lands dis-
charged of
tithes.

V. Provided always, and be it enacted by the authority aforesaid, that no person or persons shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes, for any manors, lands, tenements, or other hereditaments, which by the laws or statutes of this realm are discharged, or not chargeable with the payment of any such tithes.

The inha-
bitants of
London.

VI. Provided also, and be it enacted by authority aforesaid, that this act, nor any thing therein contained, shall in anywise bind the inhabitants of the city of *London*, and suburbs of the same, for to pay their tithes and offerings within the same city and suburbs otherwise than they ought or should have done before the making of this act; any thing in this act contained to the contrary notwithstanding.

Recoveries
may be had,
and convey-
ances made
in temporal
courts, of
tithes, as of
lands.

VII. And be it further enacted by the authority aforesaid, that in all cases, where any person or persons which now have, or which hereafter shall have any estate of inheritance, freehold, term, right, or interest, of, in, or to any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit, which now be, or which hereafter shall be made temporal, or admitted to be, abide, and go to or in temporal hands, and lay uses and profits by the law or statutes of this realm, shall hereafter fortune to be disseised, deforced, wronged, or otherwise kept or put from their lawful inheritance, estate, seisin, possession, occupation, term, right, or interest of, in, or to the same, or of, in, or to any parcel thereof, by any other person or persons claiming or pretending to have interest or title in or to the same; that then in all and every such case or cases, the person or persons so disseised, deforced, or wrongfully kept or put from his or their right or possession, as is afore rehearsed, their heirs, wives, and such other to whom such injury and wrong shall be done or committed, shall and may have their remedy in the king's temporal courts, or other temporal courts, as the case shall require, for the recovery, getting, or obtaining, of such inheritance, estate, freehold, seisin, possession,

term, right, or interest, by writs original of *præe' quod reddat*, assize of *novel disseisin*, *mortdanc' quod ei deforciat*, writs of dower, or other writs original, as the case shall require, to be devised and granted in the king's court of chancery, of every such parsonage, vicarage, portion, pension, or other profit called ecclesiastical or spiritual, so to be demanded according to the nature and cause of the suit thereof, in like manner and form as they should, ought, or might have had, of or for lands, tenements, or other hereditaments in such manner to be demanded; and that writs of covenant and other writs for fines to be levied, and all other assurances to be had, made, or conveyed, of any such parsonage, vicarage, portion, pension, or other profit called ecclesiastical or spiritual, as is aforesaid, shall be hereafter devised and granted in the said chancery according as hath been used for fines to be levied, and assurance to be had or made, or conveyed, of lands, tenements, or other hereditaments; and that all judgments to be given upon any of the said writs original, so to be devised or granted of or for any the premises, or any of them, and all fines to be levied and knowledged in any of the king's said courts thereof, shall be of like force and effect in the law, to all intents and purposes, as judgments given, and fines levied of lands, tenements, and hereditaments in the same courts upon writs original therefore duly pursued and prosecuted, albeit no such form of writs original out of the said court of chancery have heretofore proceeded or been awarded.

1540.

[46]

Judgments given, and fines, levied in the king's courts, of tithes, shall be of like force as of lands.

VIII. Provided always, that this last act shall not extend nor be expounded to give any remedy, cause of action or suit in the courts temporal against any person or persons which shall refuse or deny to set out his or their tithes, or which shall detain, withhold, or refuse to pay his tithes or offerings, or any parcel thereof; but that in all such cases the person or party, being ecclesiastical or lay person, having cause to demand or have the said tithes or offerings, and thereby wronged or grieved, shall take and have their remedy for their said tithes or offerings in every such case in the spiritual courts, according to the ordinances in the first part of this act mentioned, and not otherwise; any thing herein expressed to the contrary thereof notwithstanding.

Remedy shall be had for tithes and offerings in the spiritual courts, and not in the temporal.

27 H. 8.
c. 20.

Stat. 32 H. VIII. c. 24. A.D. 1540.

[47]

An Act concerning the Possessions of *St. John of Jerusalem*, in *England and Ireland*.

' THE lords spiritual and temporal, and the commons, in this present parliament assembled, having credible knowledge, that divers and sundry the king's subjects, called the Knights of

The lands and goods of *St. John of Jerusalem*.

1540.

lem shall be
in the king's
disposition.

The causes
why the
houses of
St. Johns of
Jerusalem
were dis-
solved, and
their lands
given to the
king.

[48]

‘ *Rhodes*, otherwise called Knights of *St. Johns*, otherwise called
 ‘ Friers of the Religion of *St. John of Jerusalem* in *England*, and
 ‘ of a like house being in *Ireland*, abiding in the parts beyond the
 ‘ sea, and having as well out of this realm, as out of *Ireland*, and
 ‘ other the king’s dominions, yearly great sums of money for main-
 ‘ tenance of their livings, have unnaturally, and contrary to the
 ‘ duty of their allegiances, sustained and maintained the usurped
 ‘ power and authority of the bishop of *Rome*, lately used and prac-
 ‘ tised within this realm, and other the king’s dominions; and
 ‘ have not only adhered themselves to the said bishop, being com-
 ‘ mon enemy to the king our sovereign lord, and to this his realm,
 ‘ untruly upholding, knowledging, and affirming maliciously and
 ‘ traiterously the same bishop to be supream and chief head of
 ‘ Christ’s church by God’s holy word, intending thereby to sub-
 ‘ vert and overthrow the good and godly laws and statutes of this
 ‘ realm, their natural country, made and grounded by authority
 ‘ of holy church, by the most excellent wisdom, policy, and good-
 ‘ ness of the king’s majesty, with the whole assent and consent of
 ‘ the realm, for the abolishing, expulsing, and utter extingting of
 ‘ the said usurped power and authority, but also have defamed
 ‘ and slandered as well the king’s majesty, as the noblemen, pre-
 ‘ lates, and other the king’s true and loving subjects of this realm,
 ‘ for their good and godly proceeding in that behalf; have there-
 ‘ fore deeply pondered and considered, that like as it is and was
 ‘ a most godly act of the king’s most royal majesty, and the said
 ‘ noblemen, prelates, and commons of this realm, utterly to ex-
 ‘ pulse and abolish, not only from this realm, but also from other
 ‘ the king’s dominions, the said usurped power and authority of
 ‘ the bishop of *Rome*, and also the hypocritical and superstitious
 ‘ religion in this realm, and other the king’s dominions, being his
 ‘ members and adherents, having their original erection and found-
 ‘ ation by the said usurped authority; by expulsing whereof, God’s
 ‘ holy word, necessary for increase of virtue, and salvation of
 ‘ christen souls, is not only purely and sincerely advanced, and set
 ‘ forth, but also the extort exactions of innumerable sums of money
 ‘ craftily exhausted out of this realm, and of other the king’s do-
 ‘ minions, by the colour of the said usurped authority, is removed,
 ‘ and taken away, to the inestimable benefit and commodity of the
 ‘ king’s loving subjects; so like manner of wise, it should be most
 ‘ dangerous to be suffered or permitted within this realm, or in
 ‘ any other the king’s dominions, any religion, being sparks,
 ‘ leaves, and imps of the said root of iniquity; considering also,
 ‘ that the isle of *Rhodes*, whereby the said religion took their old
 ‘ name and foundation, is surprised by the *Turk*; and that it were

‘ and is much better, that the possessions in this realm, and in
 ‘ other the king’s dominions, appertaining to the said religion,
 ‘ should rather be imployed and spent within this realm, and in
 ‘ other the king’s dominions, for the defence and surety of the
 ‘ same, than converted to and among such unnatural subjects, who
 ‘ have declined not only from their natural duty of obedience that
 ‘ they ought to bear unto the king our sovereign lord, but also
 ‘ from the good laws and statutes of this realm, their natural coun-
 ‘ try, daily doing, and attempting privily and craftily all that
 ‘ they can to subvert the good and godly policy, in the which,
 ‘ thanks be to God and our most dread sovereign lord, this realm
 ‘ and other the king’s dominions now stand; in consideration
 ‘ whereof, the said lords spiritual and temporal, and the com-
 ‘ mons, in this present parliament assembled, most humbly be-
 ‘ seechen the king’s most royal majesty,’ that it may be enacted by
 his highness, and by the assent of the lords spiritual and temporal,
 and the commons, in this present parliament assembled, that the
 corporation of the said religion, as well within this realm, as within
 the king’s dominion and land of *Ireland*, by whatsoever name or
 names they be founded, incorporated, or known, shall be utterly
 dissolved, and void to all intents and purposes; and that Sir
William Weston, knight, now being prior of the said religion of
 this realm of *England*, shall not be named or called from hence-
 forth, prior of *St. Johns* of *Jerusalem* in *England*, but shall be
 called by his proper name of *William Weston*, knight, without fur-
 ther addition touching the said religion; and that likewise *John*
Rauson, knight, now being prior of *Kilmainam* in *Ireland*, shall
 not be called or named from henceforth, prior of *Kilmainam* in
Ireland, but only by his proper name of *John Rauson* knight, with-
 out further addition touching the said religion; nor that any of the
 brethren or confreres of the said religion in this realm of *England*,
 and land of *Ireland*, shall be called Knights of *Rhodes*, nor Knights
 of *St. Johns*, but shall be called by their own proper christen names
 and surnames of their parents, without any other addition touching
 the said religion.

II. And be it further enacted by authority of this present parlia-
 ment, that if the said *William Weston*, or any of his brethren or
 confreres of the hospital or house of *St. John* of *Jerusalem* in *Eng-
 land*, now abiding and dwelling within this realm of *England*, or
 any other person or persons, being members professed of or in the
 said hospital, now dwelling within the said realm, at any time
 after the first day of *July* next coming, do use or wear within this
 realm or elsewhere, in or upon any apparel of their bodies, any
 sign, mark, or token heretofore used and accustomed, or hereafter
 to be devised for the knowledge of the said religion, or make any

1540.

The corpo-
 ration of re-
 ligion of *St.*
Johns in
England
 and *Ireland*
 shall be dis-
 solved.

The priors
 and con-
 freres of *St.*
John shall
 be called by
 their own
 names and
 surnames,
 without any
 addition of
 their reli-
 gion.

[49]

The penalty
 on the said
 priors or
 confreres
 wearing any
 sign of their
 religion, or
 making any
 assemblies
 touching
 the same, or
 defending,
 any privi-
 leges there-
 of.

1540.

16 R. 2.
c. 5.

congregations, chapters, or assemblies touching the same religion; or maintain, support, use, or defend any liberties, franchises, or privileges heretofore granted to the said religion, by the authority of the bishop of *Rome*, or of the see of the same; that then every of them so offending shall incur and run into the pains, forfeitures, and penalties ordained and provided by the statute of provision and *præmunire*, made in the sixteenth year of king *Richard* the second; and if the said *John Rauston* knight, or any of his brethren, or confreres of the said hospital or house of *Kilmainam* in *Ireland*, or any other person or persons, being members professed of or in the said hospital of *Kilmainam*, now abiding, and now dwelling within the land of *Ireland*, at any time after the last day of *September* next coming, do use or wear within this realm, or within the said land of *Ireland*, or elsewhere, in or upon any apparel of their bodies, any sign, mark, or token heretofore used and accustomed, or hereafter to be devised for the knowledge of the same religion, or make any congregations, chapters, or assemblies touching the same religion, or maintain, support, use, or defend any manner of liberties, franchises, or privileges heretofore granted to the same, by authority of the bishop of *Rome*, or of the see of the same; that then every of them so offending shall incur and run into the pains, forfeitures, and penalties ordained and provided by the said statute of provision and *præmunire*, made in the said sixteenth year of king *Richard* the second.

[50]

III. And be it likewise enacted by the authority aforesaid, that if any the knights, or confreres of the said religion, being the king's natural subjects, which now inhabit, abide, and dwell out of any the king's dominions, at any time after the first day of *February* next coming, do offend in any of the articles or offences next above rehearsed, that then every of them so offending shall incur and run into the said pains, forfeitures, and penalties next above remembered.

The king shall have the manors, lands, &c. lately belonging to the prior and brethren of *St. John* in *England* and *Ireland*.

IV. And be it further enacted by the authority aforesaid, that the king's majesty, his heirs and successors, shall have and enjoy all that hospital, mansion-house, church, and all other houses, edifices, buildings, and gardens to the same belonging, being near to the city of *London*, in the county of *Middlesex*, called The House of *St. Johns of Jerusalem* in *England*; and also all that hospital, church, and house of *Kilmainam* in the land of *Ireland*, and all and singular castles, honours, manors, meases, lands, tenements, rents, reversions, services, woods, meadows, pastures, parks, warrens, liberties, franchises, privileges, parsonages, tithes, pensions, portions, knights fees, advowsons, commandries, preceptories, contributions, responsions, rents, titles, entries, conditions, covenants, and all other possessions and hereditaments, of what natures, names,

or qualities soever they be, and wheresoever they be or lie within this realm of *England*, or within the land of *Ireland*, or elsewhere within the king's dominions, which appertained or belonged to the said religion, or to the priors, masters, or governors, knights, or other ministers professed of or in the same, by the pretence, or in the right of the said religion, and all and singular goods, chattels, debts, arrearages of rents and farms, and all other things real and personal, whatsoever they be, whereof or whereunto any of the said priors, brethren, or confreres, or persons professed in the said religion, can have, or claim any particular propriety to their own proper use, by the rules and statutes of the said religion; to have and to hold the premisses, and every of them, to our said sovereign lord, and to his heirs and successors for ever, to use and employ, by his most excellent wisdom and discretion, at his own free-will and pleasure; and that his highness shall be deemed and adjudged in the real and actual possession of the premisses, by virtue and authority of this present act: saving to all persons, and bodies politick, their heirs and successors, and the heirs and successors of every of them, (other than the said prior of *St. Johns of Jerusalem* in *England*, and the said prior of *Kilmainam* in the land of *Ireland*, and the brethren or confreres of every of them, and the successors of every of them, and all and every other person and persons of the said religion, and their successors, and every of them, and the successors of every of them), all such right, title, interest, possession, leases, grants, annuities, fees, offices, corrodies, reversions, rents, and services, rent-charges, commons, rights, titles, entries, actions, petitions, pensions, portions, and all other hereditaments, of what names, natures, or qualities soever they be, which they have, should, or ought to have had, if this act had never been had ne made; any thing in this act to the contrary thereof notwithstanding.

1540.

[51]

A saving of
the right of
others.

Stat. 37 H. VIII. c. 12. A. D. 1545.

An Act for Tithes in *London*.

‘ WHERE of late time contention, strife, and variance hath risen
‘ and grown within the city of *London*, and the liberties of the
‘ same, between the parsons, vicars, and curates of the said city,
‘ and the citizens and inhabitants of the same, for and concerning
‘ the payment of tithes, oblations, and other duties within the said
‘ city and liberties: for appeasing whereof, a certain order and
‘ decree was made thereof by the most reverend father in God,
‘ *Thomas* archbishop of *Canterbury*, metropolitane, chief primate
‘ of all *England*, *Thomas Audley* knight, lord *Audley* of *Walden*,
‘ and then lord chancellour of *England*, now deceased, and other

A rehearsal
of the sta-
tute of 27
H. 8. c. 21.
concerning
the payment
of tithes in
London.

1545. ' of the king's majesty's most honourable privy council, and also
 ' the king's letters patents and proclamation was made thereof, and
 ' directed to the said citizens concerning the same; whereupon it
 ' was after enacted in the parliament holden at *Westminster* by
 ' prorogation the fourth day of *February* in the twenty-seventh
 ' year of the king's majesty's most noble reign, by authority of the
 ' same parliament, that the citizens and the inhabitants of the same
 ' city should, at *Easter* then next coming, pay unto the curates of
 ' the said city and suburbs, all such and like sums of money for
 ' tithes, oblations, and other duties, as the said citizens and inha-
 ' bitants by the order of the said late lord chancellor, and other the
 ' king's most honourable council, and the king's said proclama-
 ' tion, paid or ought to have paid by force and virtue of the said
 ' order at *Easter*, which was in the year of our Lord God m^dxxxv,
 ' and the same payments so to continue from time to time, until
 [52] ' such time as any other order or law should be made, published,
 ' ratified, and confirmed by the king's highness, and the two and
 ' thirty persons by his grace to be named, as well for the full es-
 ' tablishment concerning the payment of all tithes, oblations, and
 ' other duties of the inhabitants within the said city, suburbs, and
 ' liberties of the same, as for the making of other ecclesiastical
 ' laws of this realm of *England*, and that every person denying to
 ' pay, as is aforesaid, should, by the commandment of the mayor
 ' of *London* for the time being, be committed to prison, there to
 ' remain until such time as he or they should have agreed with the
 ' curate or curates for their said tithes, oblations, and other du-
 ' ties, as is aforesaid, as in the said act more plainly appeareth:
 ' sithen which act divers variances, contentions, and strifes are
 ' newly risen and grown between the said parsons, vicars, and cu-
 ' rates, and the said citizens and inhabitants, touching the payment
 ' of the tithes, oblations, and other duties, by reason of certain
 ' words and terms specified in the said order, which are not so
 ' plainly and fully set forth, as is thought convenient and meet to
 ' be; for appeasing whereof, as well the said parsons, vicars, and
 ' curates, as the said citizens and inhabitants have compromitted
 ' and put themselves to stand to such order and decree touching
 ' the premisses, as shall be made by the said right reverend father
 ' in God, *Thomas* archbishop of *Canterbury*, metropolitane and
 ' primate of *England*; the right honourable sir *Thomas Wrythoesly*
 ' knight, lord *Wrythoesly* and lord chancellor of *England*; the
 ' right honourable *Thomas* duke of *Norfolk*, lord treasurer of
 ' *England*; the right honourable sir *William Paulet* knight; lord
 ' *St. John*, lord president of the council, and lord great master of
 ' the king's most honourable houshold; the right honourable sir
 ' *John Russel* knight, lord *Russel* and lord privy seal; the right

Arbitrators
 chosen be-
 tween the
 parsons, vi-
 cars, and
 curates of
 London,
 and the ci-
 tizens and
 inhabitants
 of the same,
 touching

‘honourable *Edward* earl of *Hertford*, lord great chamberlain of *England*; the right honourable *John* viscount *Lisle*, high admiral of *England*; sir *Richard Lister* knight, chief justice of *England*; sir *Edward Mountague* knight, chief justice of the common bench at *Westminster*; and sir *Roger Cholmely* knight, chief baron of the exchequer; for a final end and conclusion to be had and made touching the premisses for ever. And to the intent to have a full peace and perfect end between the said parties, their heirs and successors, touching the said tithes, oblations, and other duties for ever,’ be it enacted by authority of this present parliament, that such end, order, and direction, as shall be made, decreed, and concluded by the forenamed archbishop, lords, and knights, or any six of them, before the first day of *March* next ensuing, of, for, and concerning the payments of the tithes, oblations, and other duties within the said city, and the liberties of the same, and inrolled in the king’s high court of chancery of record, shall stand, remain, and be as an act of parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and inrolled; and that every person denying to pay any of his or their tithes, oblations, or other duties, contrary to the said decree so to be made, shall, by the commandment of the mayor of *London* for the time being, and in his default or negligence, by the lord chancellor of *England* for the time being, be committed to prison, there to remain till such time as he or they have agreed with the curate and curates for his or their said tithes, oblations, and other duties, as is aforesaid.

1545.

the payment
of tithes.

[53]

The penalty
upon such
as refuse to
pay their
tithes ac-
cording to
the arbitra-
tors decree.

THE DECREE.

II. As touching the payment of tithes in the city of *London*, and the liberties of the same, it is fully ordered and decreed by the most reverend father in God, *Thomas* archbishop of *Canterbury*, primate and metropolitan of *England*; *Thomas* lord *Wryothestly*, lord chancellor of *England*; *William* lord *St. John*, president of the king’s majesty’s council, and lord great master of his highness household; *John* lord *Russell*, lord privy seal; *Edward* earl of *Hertford*, lord great chamberlain of *England*; *John* viscount *Lisle*, high admiral of *England*; *Richard Lister* knight, chief justice of *England*; and *Richard Cholmely* knight, chief baron of his grace’s exchequer; this present twenty-fourth day of *February*, anno Domini, secundum cursum & computationem ecclesiæ Anglicanæ, millesimo quingentesimo quadragésimo quinto, according to the statute in such case lately provided, that the citizens and inhabitants of the said city of *London*, and liberties of the same, for the time being, shall yearly without

1545. fraud or covin for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following; that is to wit, of every x s. rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same, xvj d. ob.; and of every xx s. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them within the said city and liberties, ij s. and ix d.; and so above the rent of xx s. by the year, ascending from x s. to x s. according to the rate aforesaid.

Parsons, vi-
cars, cu-
rates, tithes.

[54]

III. *Item*, That where any lease is or shall be made of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed, or is, or that any such lease shall be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin; that then in every such case the tenant or farmer, tenants and farmers thereof shall pay, for his or their tithes of the same, after the rate aforesaid, according to the quality of such rent or rents, as the same house or houses, shops, warehouses, cellars, or stables, or any of them were last letten for, without fraud or covin, before the making of such lease.

IV. *Item*, That every owner or owners, inheritor or inheritors of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same himself or themselves, shall pay after such rate or tithes as is abovesaid, after the quantity of such yearly rent as the same was last letten for, without fraud or covin.

Leases.

V. *Item*, If any person or persons have taken, or hereafter shall take any mease or mansion place by lease, and the taker or takers thereof, his or their executors or assigns, doth or shall inhabit in any part thereof, and have or hath within eight years last past before this order, or hereafter will or shall let out the residue of the same, that then in such case the principal farmer or farmers, or first taker or takers thereof, his or their executors or assigns, shall pay his or their tithes, after the rate aforesaid, according to his or their quantity therein, and that his or their executors, assignee or assignees, shall pay his or their tithes after the rate abovesaid, according to the quantity of their rent by year.

VI. And that if any person or persons have, or shall take divers mansion houses, shops, warehouses, cellars, or stables, in one lease, and letteth, or shall let out one or more of the said houses, and keepeth or shall keep one or more in his or their own hands, and inhabiteth or inhabit in the same, that then the said taker or takers, and his and their executors or assigns shall pay his or their tithes

after the rate abovesaid, according to the quantity of the yearly rent of such mansion house or houses, retained in his or their hands; and that his assignee or assignees of the residue of the said mansion house or houses shall pay his or their tithes after the rate abovesaid, according to the quantity of their yearly rents. 1545.

VII. *Item*, If such farmer or farmers, or his or their assigns of any mansion house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last past, or shall hereafter let over all the said mansion house or houses contained in his or their lease, to one person, or to divers persons, that then the inhabitants, lessees, or occupiers of them, and every of them, shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assignee or assignees, have been or shall be charged withal, without fraud or covin. [55]

VIII. *Item*, If any dwelling-house, within eight years last past, was, or hereafter shall be, converted into a warehouse, storehouse, or such like, or if a warehouse, storehouse, or such like, within the said eight years, was, or hereafter shall be, converted into a dwelling-house, that then the occupiers thereof shall pay tithes for the same, after the rate above declared of mansion-house rents.

IX. *Item*, That where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dying or brewing, reserving a rent upon the same, as well in respect of such implements, as in respect of such dyehouse or brewhouse, that then the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated; and that every principal house or houses, with key or wharf, having any crane or gibet belonging to the same, shall pay after the like rate of their rents, as is aforesaid, the third penny abated: and that other wharfs belonging to houses having no crane or gibet, shall pay for his tithes as shall be paid for mansion-houses, in form aforesaid.

X. *Item*, That where any mansion-house, with a shop, stable, warehouse, wharf with crane, timber-yard, teinter-yard, or garden, belonging to the same, or as parcel of the same, is or shall be occupied together, that if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided, that then the farmer or farmers, occupier or occupiers thereof, shall pay such tithes as is abovesaid, for such shops, stable, warehouses, wharf with crane, timber-yard, teinter-yard, or garden, aforesaid, so severed or divided, after the rate of their several rents thereupon reserved.

XI. *Item*, That the said citizens and inhabitants shall pay their tithes quarterly, that is to say, at the feast of *Easter*, the nativity of *St. John Baptist*, the feast of *St. Michael the Archangel*, and the nativity of our Lord, by even portions.

1545.

XII. *Item*, That every housholder paying ten shillings rent or above, shall, for him or her self, be discharged of their four offering-days: but his wife, children, servant, or others of their family, taking the rights of the church at *Easter*, shall pay two-pence for their four offering-days yearly.

XIII. Provided always, and it is decreed, that if any house or houses which hath been or hereafter shall be letten for ten shillings rent by year, or more, be or hath, at any time within eight years last passed, or hereafter shall be divided and leased into small parcels or members, yielding less yearly rent than ten shillings by the year; that then the owner or owners, if he or they dwell in any part of such house, or else the principal lessee and lessees, if the owner or owners do not dwell in some part of the same, shall from henceforth pay for his or their tithes after such rate of rent as the same house was accustomed to be letten for, before such division or dividing into parts or members; and the under farmer and farmers, lessee and lessees, to be discharged of all tithes for such small parcels, parts, or members, rented at less yearly rent than ten shillings by year, without fraud or covin, paying two-pence yearly for four offering-days.

XIV. Provided always, and it is decreed, that for such gardens as appertain not to any mansion-house, and which any person or persons holdeth or shall hold in his or their hands for pleasure or to his own use; that the then person so holding the same shall pay no tithes for the same: but if any person or persons, which holdeth, or shall hold any such garden, containing half an acre or more, doth or shall make any yearly profit thereof by way of sale, that then he or they shall pay tithes for the same, after such rate of his rent, as is herein first above specified.

XV. Provided also, that if any such gardens now being of the quantity of half an acre, or more, be hereafter by fraud or covin divided into less quantity or quantities, then to pay tithe according to the rate abovesaid.

XVI. Provided always, that this decree shall not extend to the houses of great men, or noble men, or noble women, kept in their own hands, and not letten for any rent, which in times past hath paid no tithes, so long as they shall so continue unletten: nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

[57] XVII. Provided always, and it is decreed, that this present order and decree shall not in anywise extend to bind or charge any sheds, stables, cellars, timber-yards, ne teinter-yards, which were never parcel of any dwelling-house, ne appertaining or belonging to any dwelling-house, ne have been accustomed to pay any tithes;

but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed. 1545.

XVIII. Provided also, and it is decreed, that where less sum than after sixteen-pence halfpeny in the ten shillings rent, or less sum than two shillings nine-pence in the twenty shillings rent, hath been accustomed to be paid for tithes; that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.

XIX. *Item*, It is also decreed, that if any variance, controversy, or strife, do or shall hereafter arise in the said city for non-payment of any tithes; or if any variance or doubt arise upon the true knowledge or division of any rent or tithes, within the liberties of the said city, or of any extent or assessment thereof, or if any doubt arise upon any other thing contained within this decree; that then upon complaint made by the party grieved, to the mayor of the city of *London* for the time being, the said mayor, by the advice of council, shall call the said parties before him, and make a final end in the same, with costs to be awarded by the discretion of the said mayor and his assistants, according to the intent and purport of this present decree.

XX. And if the said mayor make not an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved, that then the lord chancellor of *England* for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.

XXI. Provided always, that if any person or persons take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruine or decay, breunning, or such like occasions or misfortunes; that then such person or persons, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his or their lease, and none otherwise, as long as the same lease shall endure.

Stat. 2 & 3 Ed. VI. c. 13. A. D. 1548.

[58]

An Act for Payment of Tithes.

‘ WHERE in the parliament holden at *Westminster* the iv. day of *February* in the xxvij. year of the reign of the late king of most famous memory, king *Henry* the viij. there was an act made concerning payment of tithes predial and personal: and also in another parliament holden at *Westminster* the xxiij. day of *July* in the xxxij. year of the reign of the said late king *Henry* the viij. another act was made concerning the true payment of

In what manner tithes ought to be paid.

1548. ' tithes and offerings ; in which several acts many and divers things
 ' be omitted and left out, which were convenient and very necessary
 ' to be added to the same : in consideration whereof, and to the
 ' intent the said tithes may be hereafter truly paid, according to
 ' the mind of the makers of the said acts,' be it ordained and
 enacted by the king our sovereign lord, with the assent of the lords
 spiritual and temporal, and the commons, in this present parlia-
 ment assembled, and by the authority of the same, that not only
 the said acts made in the said xxvij. and xxxij. years of the reign
 of the said late king *Henry* the viij. concerning the true payment
 of tithes, and every article and branch therein contained, shall abide
 and stand in their full strength and virtue; but also be it further
 enacted by the authority of this present parliament, that every of
 the king's subjects shall from henceforth truly and justly, without
 fraud or guile, divide, set out, yield and pay, all manner of their
 predial tithes in their proper kind as they rise and happen, in such
 manner and form as hath been of right yielded and paid within
 forty years next before the making of this act, or of right or cus-
 tom ought to have been paid : and that no person shall from
 henceforth take or carry away any such or like tithes, which have
 been yielded or paid within the said forty years, or of right ought
 to have been paid, in the place or places titheable of the same, be-
 fore he hath justly divided or set forth for the tithe thereof the tenth
 part of the same, or otherwise agreed for the same tithes with the
 parson, vicar, or other owner, proprietary or fermor of the same
 tithes ; under the pain of forfeiture of treble value of the tithes so
 taken or carried away.

Every per-
 son shall set
 forth and
 pay his
 predial
 tithes.

The penalty
 for carrying
 corn or
 hay before
 tithe be set
 forth, or
 for letting
 the parson
 to carry it.
 * [59]

II. And be it also enacted by the authority aforesaid, that at all
 times whensoever and as often as the said predial tithes shall be due
 * and at the tithing time of the same, it to be lawful to every party
 to whom any of the said tithes ought to be paid, or his deputy or
 servant, to view and see their said tithes to be justly and truly set
 forth and severed from the nine parts, and the same quietly to take
 and carry away : and if any person carry away his corn or hay or his
 other predial tithes, before the tithe thereof be set forth ; or willingly
 withdraw his tithes of the same or of such other things whereof
 predial tithes ought to be paid ; or do stop or let the parson, vicar,
 proprietor, owner, or other their deputies or farmers, to view, take,
 and carry away their tithes as is abovesaid ; by reason whereof
 the said tithe or tenth is lost, impaired, or hurt ; that then upon
 due proof thereof made before the spiritual judge or any other judge
 to whom heretofore he might have made complaint, the party so
 carrying away, withdrawing, letting, or stopping, shall pay the
 double value of the tenth or tithe so taken, lost, withdrawn, or
 carried away, over and besides the costs, charges, and expences of

the suit in the same: the same to be recovered before the ecclesiastical judge according to the king's ecclesiastical laws.

1548.

III. And be it further enacted by the authority aforesaid, that all and every person which hath or shall have any beasts or other cattle titheable, going, feeding, or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the increase of the said cattle so going in the said waste or common, to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies of the parish, hamlet, town, or other place, where the owner of the said cattle inhabiteth or dwelleth.

Tithe of cattle feeding in a waste where the parish is not known.

IV. Provided always, and be it enacted by the authority aforesaid, that no person shall be sued or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real. 32 H. 8. c. 7. § 5.

Lands discharged of tithe by prescription or composition.

V. Provided always, and be it enacted by the authority aforesaid, that all such barren heath or waste ground, other than such as be discharged for the payment of tithes by act of parliament, which before this time have lain barren and paid no tithes by reason of the same barrenness, and now be, or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same; any thing in this act to the contrary in anywise notwithstanding.

The tithe of barren heath or waste ground.

[60]

VI. Provided always, and be it enacted by the authority aforesaid, that if any such barren, waste, or heath ground, hath before this time been charged with the payment of any tithes, and that the same be hereafter improved or converted into arable ground or meadow, that then the owner or owners thereof shall, during seven years next following from and after the same improvement, pay such kind of tithe as was paid for the same before the said improvement; any thing in this act to the contrary in anywise notwithstanding.

VII. And be it also further enacted by the authority aforesaid, that every person exercising merchandises, bargaining and selling, clothing, handicraft or other art or faculty, being such kind of persons, and in such places, as heretofore within these forty years have accustomedly used to pay such personal tithes, or of right ought to pay, (other than such as been common day-labourers,) shall yearly, at or before the feast of *Easter*, pay for his personal tithes the tenth part of his clear gains, his charges and expences,

Who shall pay their personal tithes.

1548. according to his estate, condition, or degree, to be therein abated, allowed, and deducted.

Handi-
craftsmen
having used
to pay
tithes.

VIII. Provided always, and be it enacted, that in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes to be observed and to continue; any thing in this act to the contrary notwithstanding.

The ordi-
nary may
examine
him that
refuseth to
pay his
tithes.

IX. And be it also enacted by the authority aforesaid, that if any person refuse to pay his personal tithes in form aforesaid, that then it shall be lawful to the ordinary of the same diocese where the party that so ought to pay the said tithes is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the parties own corporal oath, concerning the true payment of the said personal tithes.

Payment of
offerings.

[61]

X. Provided always, and be it enacted by the authority aforesaid, that all and every person and persons, which by the laws or customs of this realm ought to make or pay their offerings, shall yearly, from henceforth, well and truly content and pay his or their offerings to the parson, vicar, proprietor, or their deputies or farmers, of the parish or parishes where it shall fortune or happen him or them to dwell or abide; and that at such four offering days, as at any time heretofore within the space of four years last past, hath been used and accustomed for the payment of the same, and in default thereof to pay for their said offerings at *Easter* then next following.

Tithe of
fish.

XI. Provided also, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to any parish which stands upon and towards the sea-coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have, by reason thereof, used to satisfy their tithes by fish; but that all and every such parish and parishes shall hereafter pay their tithes according to the laudable customs, as they have heretofore of ancient time within these forty years used and accustomed, and shall pay their offerings as is aforesaid.

Payment of
tithe by
houses.

XII. Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend in anywise to the inhabitants of the city of *London* and *Canterbury*, and the suburbs of the same, ne to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act; any thing contained in this act to the contrary in anywise notwithstanding.

Suits for
withholding
tithes shall

XIII. And be it further enacted by authority aforesaid, that if any person do substract or withdraw any manner of tithes, obven-

tions, profits, commodities, or other duties before mentioned, or any part of them, contrary to the true meaning of this act, or of any other act heretofore made, that then the party so substracting or withdrawing the same, may or shall be convented and sued in the king's ecclesiastical court, by the party from whom the same shall be substracted or withdrawn, to the intent the king's judge ecclesiastical shall and may then and there hear and determine the same, according to the king's ecclesiastical laws: and that it shall not be lawful unto the parson, vicar, proprietor, owner, or other their farmers or deputies, contrary to this act, to convent or sue such withholder of tithes, obventions, and other duties aforesaid, before any other judge than ecclesiastical. And if any archbishop, bishop, chancellor, or other judge ecclesiastical, give any sentence in the foresaid causes of tithes, obventions, profits, emoluments, and other duties aforesaid, or in any of them, (and no appeal ne prohibition hanging,) and the party condemned do not obey the said sentence, that then it shall be lawful to every such judge ecclesiastical to excommunicate the said party so as afore condemned and disobeying; in the which sentence of excommunication, if the said party excommunicate wilfully stand and endure still excommunicate by the space of forty days next after, upon denunciation and publication thereof in the parish-church, or the place or parish where the party so excommunicate is dwelling, or most abiding, the said judge ecclesiastical may then, at his pleasure, signify to the king, in his court of chancery, of the state and condition of the said party so excommunicate, and thereupon to require process *de excommunicato capiendo* to be awarded against every such person as hath been so excommunicate.

1548.

be in the
ecclesiasti-
cal court.

Excommu-
nication of
the party
condemned.

[62]

XIV. Be it further enacted by the authority aforesaid, that if any party at any time hereafter, for any matter or cause before rehearsed, limited, or appointed by this act, to be sued or determined in the king's ecclesiastical court, or before the ecclesiastical judge, do sue for any prohibition in any of the king's courts where prohibitions before this time have been used to be granted, that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court where such party demandeth the prohibition, the very true copy of the libel depending in the ecclesiastical court, concerning the matter wherefore the party demandeth the prohibition, subscribed or marked with the hand of the same party; and under the copy of the said libel shall be written the suggestion wherefore the party so demandeth the said prohibition: and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the said prohibition shall be so granted, within six months

A copy of
the libel
shall be de-
livered to
the judges
before a
prohibition
granted.

A consult-
ation grant-
ed for de-
fault of

1548.
 proving a
 suggestion.

next following after the said prohibition shall be so granted and awarded, that then the party that is letted or hindred of his or their suit in the ecclesiastical court by such prohibition, shall, upon his or their request and suit, without delay, have a consultation granted in the same case, in the court where the said prohibition was granted; and shall also recover double costs and damages against the party that so pursued the said prohibition, the said costs and damages to be assigned or assessed by the court where the said consultation shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint, or information, in any of the king's courts of record, wherein the defendant shall not wage his or their law, nor have any essoin or protection allowed or admitted.

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 Of what
 things a
 judge ec-
 clesiastical
 shall not
 hold plea.

XV. Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to give any minister or judge ecclesiastical any jurisdiction to hold plea of any matter, cause, or thing, being contrary or repugnant to or against the effect, intent, or meaning of the statute of *Westminster* second, the fifth chapter, the statutes of *articuli cleri*, *circumspecte agatis*, *silva-cædua*, the treatise *de regia prohibitione*, ne against the statute of *anno primo Edwardi tertii*, the tenth chapter, or any of them, ne yet hold plea in any matter whereof the king's court of right ought to have jurisdiction; any thing herein contained to the contrary in anywise notwithstanding.

No tithes of
 marriage
 goods shall
 be paid in
 Wales, &c.

XVI. Provided nevertheless, where heretofore such a custom hath been in many parts of *Wales*, that of such cattel and other goods as hath been given with the marriage of any person, their tithes have been exacted and levied by the parsons and curates in those parts: which custom being dissonant from any part of this realm, as it seemed when the said country of *Wales* was, through civil dissension, unculted, for want of other sufficient profits that might otherwise grow to the curates and ministers there, to have been for that time tolerable: so now the country being well manured and husbanded, and the tithe is duly paid there of corn, hay, wool, and cheese, and of other increase of all manner of cattel, as it is commonly in all other parts of this realm, the same custom seems to be grievous and unreasonable, specially where the benefices are else sufficient for the finding of the said ministers and curates: that it be therefore enacted by the authority aforesaid, that, from and after the first day of *May* next coming, no such tithes of marriage goods be exacted or required of any person within the said dominion of *Wales*, or marches of the same; any thing in this act contained, or any other act, custom, or prescription, had or made to the contrary hereof notwithstanding.

Die Veneris 8 Novembris 1644.

1644.

AN ORDINANCE of the LORDS and COMMONS, assembled in Parliament, for the true Payment of Tithes and other such Duties, according to the Laws and Customs of the Realm.

‘ WHEREAS divers persons within the realme of *England*, and dominion of *Wales*, taking advantage of the present distractions, and ayming at their own profit, have refused, and still do refuse, to set out, yeeld, and pay tithes, offerings, oblations, obventions, and other such duties, according to the law of the said realme, to which they are the more encouraged, both because there is not now any such compulsory meanes for recovery of them by any ecclesiastical proceedings as heretofore hath been, and also for that by reason of the present troubles there cannot be had speedie remedie for them in the temporal courts, although they remaine still due, and of right payable, as in former times;’ be it therefore declared and ordained by the lords and commons in parliament assembled, that every person and persons whatsoever within the said realme and dominion, shall fully, truly, and effectually set out, yeeld, and pay respectively all and singular tithes, offerings, oblations, obventions, rates for tithes, and all other duties commonly knowne by the name of Tithes, and all arreares of them respectivelie, to all and every the respective owners, proprietors, impropietors, and possessors, as well lay as ecclesiastical respectivelie, their executors and administrators, of parsonages, vicarages, or rectories, either impropriate, or presentative, or donative, and of vicarages, and of portions of tithes respectivelie, within the said realme and dominion, according to the law, custome, prescription, composition, or contract respectivelie, by which they or any of them ought to have been set out, yeelded, and paid at the beginning of this present parliament, or two yeares before; and in all and every case where any person or persons hath at any time since the beginning of this present parliament, or two yeares before, substracted, withdrawn, or failed, in due payment of, or hereafter at any time shall substract, withdraw, or faile in due paiment of any such tithes, offerings, oblations, obventions, rates for tithes, or any duty knowne by the name of Tithes, or arreares of them, or any of them, as aforesaid, the person or persons to whom the same is, hath been, or shall be respectivelie due, his executors or administrators, shall and may make his and their complaint thereof to any two justices of peace within the same countie, citie, towne, place, riding, or division, not being patron or patrons of the church where such substraction, withdrawing, or failer of paiment hath been, or shall be, nor being interested any way in the things in question; which justices of peace are authorized hereby, and shall

[66]

1644.

have full power to summon, by reasonable warning before-hand, all and every such person or persons against whom any such complaints shall be made to them, and after his or their appearance before them, or upon default made after the second summons, the said summons being made as aforesaid, and proved before the said justices by oath, which said justices shall hereby have power to administer the same, to heare and determine the said complaint, by sending for and examining witnesses upon oath; which said oath the said justices are hereby also authorized to minister, and admitting other proofs brought on either side, and thereupon shall, in writing under their hands and seale, adjudge the case, and give reasonable costs and dammages to either party, as in their judgement they shall thinke fit.

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And be it further ordained by the authoritie aforesaid, that if any person or persons shall refuse to pay any such tithes or summes of money as upon such complaint and proceeding shall be by any such justices of peace adjudged as aforesaid, and shall not within thirtie daies next after notice of judgement, in writing under the hand and seale of such justices of peace given to him or them, make full satisfaction thereof according to the said judgement, in every such case the person and persons respectivelie to whom any such tithes or summes of money shall be upon such judgement due, shall and may by warrant from the said justices, or either of them, distraine all and everie, or any the goods and chattels of the partie or parties so refusing, and of the same make sale, and retaine to himself or themselves so much of the monies raised by sale thereof as may satisfie the said judgement, returning the overplus thereof to the partie or parties so refusing; and in case no sufficient distress can be found, that then the said justices of peace, or any other justices of peace of the same countie as aforesaid, shall and may commit all and every such person and persons so refusing to the next common goale of the said countie, there to remaine in safe custodie, without baile or maineprize, until he or they respectivelie shall make full satisfaction according to the said judgement.

Provided alwaies, and it is further ordained by the authority aforesaid, that if any person or persons shall thinke him or themselves unjustly dealt with by or in any such judgement as aforesaid, then he or they respectivelie shall and may thereof complaine to the high court of chancerie, where the cause between the parties shall be againe heard and determined; which court shall hereby have full power and authoritie to summon the parties, and to heare and determine the same; and to suspend execution as the same court shall see cause; and to give finall judgement therein, with reasonable costs, to the partie or parties grieved by any such complaint brought before them.

Provided alwaies, that this ordinance, or any thing therein contained, shall not extend to any tithes, offerings, yeerely paiments, or other ecclesiastical duties, due or to be due for any houses, buildings, or other hereditaments, within the citie of *London*, or the liberties thereof, which be otherwise provided for by act of parliament.

1644.

Stat. 22 & 23 Car. II. c. 15. A. D. 1670.

[68]

An Act for the better Settlement of the Maintenance of the Parsons, Vicars, and Curates, in the Parishes of the City of *London* burnt by the late dreadful Fire there.

‘ WHEREAS the tythes in the city of *London* were levied and paid with great inequality, and are since the late dreadful fire there, in the re-building of the same, by taking away of some houses, altering the foundations of many, and the new erecting of others, so disordered, that in case they should not for the time to come be reduced to a certainty, many controversies and suits of law might thence arise;’ be it enacted by the king’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the annual certain tythes of all and every parish and parishes within the said city of *London*, and the liberties thereof, whose churches have been demolished, or in part consumed by the late fire, and which said parishes by virtue of an act of this present parliament, intituled, *An additional act for the re-building of the city of London, uniting of parishes, and re-building of the cathedral and parochial churches within the said city*, remain and continue single, as heretofore they were, or are by the said act annexed or united into one parish respectively, shall be as followeth; (that is to say,) the annual certain tythes, or sum of money in lieu of tythes,

The reasons of the act.

22 Car. 2.
c. 11.

II. Of the parish of *Alhallowes Lombard-street*, one hundred and ten pounds, cx l.

2. Of *St. Bartholomew Exchange*, one hundred pounds, c l.

3. Of *St. Bridget*, alias *Brides*, one hundred and twenty pounds, cxx l.

4. Of *St. Bennet Finck*, one hundred pounds, c l.

5. Of *St. Michael Crooked-lane*, one hundred pounds, c l.

6. Of *St. Christopher*, one hundred and twenty pounds, cxx l.

7. Of *St. Dionis Backchurch*, one hundred and twenty pounds, cxx l.

8. Of *St. Dunstan in the east*, two hundred pounds, cc l.

9. Of *St. James Garlick Hythe*, one hundred pounds, c l.

1670.

[69]

10. Of *St. Michael Cornhill*, one hundred and forty pounds, cxl l.
11. Of *St. Michael Bassishaw*, one hundred thirty and two pounds and eleven shillings, cxxxii l. xi s.
12. Of *St. Margaret Lothbury*, one hundred pounds, cl l.
13. Of *St. Mary Aldermanbury*, one hundred and fifty pounds, cl l.
14. Of *St. Martin Ludgate*, one hundred and sixty pounds, clx l.
15. Of *St. Peter Cornhill*, one hundred and ten pounds, cx l.
16. Of *St. Stephen Coleman-street*, one hundred and ten pounds, cx l.
17. Of *St. Sepulchre*, two hundred pounds, cc l.
18. Of *Alhallows Bread-street*, and *St. John Evangelist*, one hundred and forty pounds, cxl l.
19. Of *Alhallows the Great*, and *Alhallows the Less*, two hundred pounds, cc l.
20. Of *St. Alban Wood-street*, and *St. Olaves Silver-street*, one hundred and seventy pounds, clxx l.
21. Of *St. Anne and Agnes*, and *St. John Zachary*, one hundred and forty pounds, cxl l.
22. Of *St. Augustine*, and *St. Faith*, one hundred seventy and two pounds, clxxii l.
23. Of *St. Andrew Wardrobe*, and *St. Anne Blackfryers*, one hundred and forty pounds, cxl l.
24. Of *St. Antholin*, and *St. John Baptist*, one hundred and twenty pounds, cxx l.
25. Of *St. Bennet Gracechurch*, and *St. Leonard Eustcheap*, one hundred and forty pounds, cxl l.
26. Of *St. Bennet Pauls-wharf*, and *St. Peters Pauls-wharf*, one hundred pounds, cl l.
27. Of *Christ Church*, and *St. Leonard Foster-lane*, two hundred pounds, cc l.
28. Of *St. Edmond the King*, and *St. Nicholas Acons*, one hundred and eighty pounds, clxxx l.
29. Of *St. George Botolph-lane*, and *St. Botolph Billingsgate*, one hundred and eighty pounds, clxxx l.
30. Of *St. Lawrence Jewry*, and *St. Magdalen Milk-street*, one hundred and twenty pounds, cxx l.
31. of *St. Magnus*, and *St. Margaret New Fish-street*, one hundred and seventy pounds, clxx l.
32. Of *St. Michael Royal*, and *St. Martin Vintry*, one hundred and forty pounds, cxl l.
33. Of *St. Matthew Friday-street*, and *St. Peter Chcap*, one hundred and fifty pounds, cl l.
34. Of *St. Margaret Pattons*, and *St. Gabriel Fenchurch*, one hundred and twenty pounds, cxx l.

[70]

35. Of *St. Mary at Hill*, and *St. Andrew Hubbard*, two hundred pounds, cc l. 1670.

36. Of *St. Mary Woolnoth*, and *St. Mary Woolchurch*, one hundred and sixty pounds, clx l.

37. Of *St. Clement Eastcheap*, and *St. Martin Orgars*, one hundred and forty pounds, cxl l.

38. Of *St. Mary Abchurch*, and *St. Lawrence Pountney*, one hundred and twenty pounds, cxx l.

39. Of *St. Mary Aldermary*, and *St. Thomas Apostles*, one hundred and fifty pounds, cl l.

40. Of *St. Mary le Bow*, *St. Pancras Soper-lane*, and *Alhallows Honey-lane*, two hundred pounds, cc l.

41. Of *St. Mildred Poultry*, and *St. Mary Cole Church*, one hundred and seventy pounds, clxx l.

42. Of *St. Michael Wood-street*, and *St. Mary Staining*, one hundred pounds, c l.

43. Of *St. Mildred Bread-street*, and *St. Margaret Moses*, one hundred and thirty pounds, cxxx l.

44. Of *St. Michael Queenhyth*, and *Trinity*, one hundred and sixty pounds, clx l.

45. Of *St. Magdalen Old Fish-street*, and *St. Gregory*, one hundred and twenty pounds, cxx l.

46. Of *St. Mary Somerset*, and *St. Mary Mounthaw*, one hundred and ten pounds, cx l.

47. Of *St. Nicholas Cole Abby*, and *St. Nicholas Olaves*, one hundred and thirty pounds, cxxx l.

48. Of *St. Olave Jewry*, and *St. Martin Ironmonger-lane*, one hundred and twenty pounds, cxx l.

49. Of *St. Stephen Walbrook*, and *St. Bennet Sheerhogg*, one hundred pounds, c l.

50. Of *St. Swythin*, and *St. Mary Bothaw*, one hundred and forty pounds, cxl l.

51. Of *St. Vedast*, alias *Fosters*, and *St. Michael Quern*, one hundred and sixty pounds, clx l.

III. Which respective sums of money to be paid in lieu of tithes within the said respective parishes, and assessed as hereinafter is * directed, shall be, and continue to be esteemed, deemed, and taken, to all intents and purposes, to be the respective certain annual maintenance, (over and above glebes and perquisites, gifts and bequests, to the respective parson, vicar, and curate, of any parish for the time being, or to his or their respective successors, or to other persons for his or their use) of the said respective parsons, vicars, and curates, who shall be legally instituted, inducted, and admitted into the respective parishes aforesaid.

The rate-tithes shall be paid, besides glebes, perquisites, and bequests.

* [71]

1670.

Who to
make the
assess-
ments, and
when.

IV. And that the said several sums of money for tithes may be more equally assessed upon the several houses, buildings, and all other hereditaments whatsoever, within all the said respective parishes; be it enacted by the authority aforesaid, that the alderman of such respective ward or wards within the said city, wherein any of the said parishes respectively lie, and his or their deputy or deputies, and the common-councilmen of such respective ward or wards, with the churchwardens, and one or more of the parishioners of such respective parish, wherein the maintenance aforesaid is respectively to be assessed, to be nominated by such respective alderman, deputy, common-councilmen, and churchwardens, or any five of them, whereof the alderman or his deputy to be one, shall at some convenient and seasonable time before the twentieth day of *May*, in the year of our Lord God one thousand six hundred and seventy-one, assemble and meet together in some convenient place within every of the respective parishes, in such respective ward wherein the maintenance aforesaid is to be assessed; and they or the major part of them so assembled, shall proportionably assess upon all houses, shops, warehouses, and cellars, wharfs, keys, cranes, water-houses, (which water-houses shall pay in their respective parishes where they stand, and not elsewhere,) and tofts of ground, (remaining unbuilt,) and all other hereditaments whatsoever, (except parsonage and vicarage houses,) the whole respective sum by this act appointed, or so much of it as is more than what each impropiator is by this act enjoined respectively to allow, in the most equal way that the said assessors, according to the best of their judgements, can make it; which said assessments shall be made and finished before the four and twentieth day of *July* then next ensuing.

If any va-
riance arise
upon the
assess-
ments, who
to deter-
mine it.

[72]

V. And be it further enacted by the authority aforesaid, that if any variance or doubt shall happen or arise about any sum so assessed as aforesaid, or that any parishioner or parishioners, or owner or owners of any house, shop, warehouse, or cellar, wharf, key, crane, water-house, toft of ground, or other hereditament within any of the said parishes, shall find himself or themselves aggrieved by the assessing of any sum or sums of money, in manner and form aforesaid, that then upon complaint made by the party or parties aggrieved, to the lord mayor and court of aldermen of the said city, within fourteen days after notice given to the party or parties assessed, of such assessment made, the said lord mayor and court of aldermen summoning as well the party or parties aggrieved, as the alderman and such others as made the said assessment, shall hear and determine the same in a summary way, and the judgement by them given shall be final, and without appeal.

VI. Provided always, and be it enacted, that any assessment or rate to be made or laid by virtue of this act, shall or may in all or any the parishes aforesaid, in like manner, be reviewed, or altered, or laid again within three months after the twenty-fourth day of *June* one thousand six hundred and seventy-four, according to the aforesaid rules, and any such assessment or rate shall or may be again reviewed, or re-assessed, within three months after the twenty-fourth day of *June*, in the year of our Lord one thousand six hundred eighty-one; and that all and every such new assessment and rate shall be liable to the like appeals, as aforesaid, and shall be collected, levied, and paid, as any other assessment or rate mentioned in this act, may or ought to be.

1670.

A review,
if occasion
be, of any
assessment.

VII. And if the said alderman, deputy, common-councilmen, and parishioner or parishioners so appointed as aforesaid, shall, after summons and request made in that behalf unto them, by the lord mayor and court of aldermen, or the incumbent or incumbents of any of the said respective parish or parishes, refuse and neglect to meet and make such assessments as aforesaid, then it shall and may be lawful to and for such person or persons as shall be thereunto authorized and required by the said lord mayor and court of aldermen, to make such assessment, as by the said aldermen, deputy, common-councilmen, churchwardens, parishioner or parishioners aforesaid, should or ought to have been made.

If the per-
sons ap-
pointed by
this act re-
fuse to act,
then others
to be chosen
by the lord
mayor, &c.

VIII. And be it further enacted by the authority aforesaid, that the said assessors within ten days after such assessments made, and the respective appeals (if any be) determined, shall make three transcripts thereof in parchment, containing the respective sums to be payable, or appointed to be paid out of all and every the premises within such respective parish, and subscribe the same under their hands, and within twenty days after such subscription, as aforesaid, one of the said transcripts shall be returned to the lord mayor of the city of *London*, to be kept and preserved by the said lord mayor, in and among the records of the said city, for a perpetual memorial thereof; and another of the said transcripts shall be returned into the registry of the lord bishop of *London*, to be kept and preserved, as aforesaid; and the other of the said transcripts shall remain and be kept in the vestry of such respective parish, for a perpetual memorial, as aforesaid.

Three tran-
scripts
thereof to
be made by
the assess-
ors;

[73]
one to be
returned to
the lord
mayor, an-
other to the
bishop of
London's
registry, the
other to re-
main in the
vestry.

IX. And for the surer and better payment of the said respective sums of money so to be assessed and taxed towards the raising of the said maintenance of the respective parsons, vicars, and curates of the said respective parishes, as aforesaid; be it further enacted by the authority aforesaid, that all and every such respective sum and sums of money so to be assessed and taxed, as aforesaid, towards the raising of the said maintenance of the said respective parsons,

When the
same money
shall be
paid, and to
whom.

1670.

vicars, and curates, of the said respective parishes, shall be paid to the said respective parsons, vicars, and curates, and their successors respectively, at the four most usual feasts; (that is to say,) at the annunciation of the blessed virgin *Mary*, the nativity of *St. John Baptist*, the feast of *St. Michael* the archangel, and the nativity of our blessed Saviour, or within fourteen days after each of the feasts aforesaid, by equal payments; the respective payments thereof to begin and commence only from such time and times as the incumbent or incumbents of such respective parish shall begin to officiate or preach as incumbent or parson in the respective church belonging to such respective parish, or in some other convenient place or places in such respective parish or parishes, to be nominated or appointed by the lord bishop of *London* for the time being, or by the archbishop of *Canterbury*, in any place within his peculiars.

Impropr-
iators to make
the same al-
lowances
they did be-
fore the fire.

X. And in any parish or parishes where any impropriations be, be it enacted by the authority aforesaid, that all and every the impropriator or impropriators of any of the said parishes shall pay and allow what really and *bonâ fide* they have used, and ought to pay and satisfy to the respective incumbent of such respective parish, at any time before the said late fire, and the same shall be esteemed and computed as part of the maintenance of such incumbent; notwithstanding this act, or any clause or matter, or thing therein contained.

Upon re-
fusal of pay-
ment, how
to levy it.

[74]

XI. And be it further enacted by the authority aforesaid, that if any the inhabitants in any respective parish or parishes as aforesaid, shall or do refuse or neglect to pay to the respective incumbents aforesaid, of any of the said respective parishes, any sum or sums of money to him respectively payable, or appointed to be paid by this act, or any part thereof, contrary to the true intent and meaning of this act, (being lawfully demanded at the house or houses, wharf, key, crane, cellar, or other premises, whereout the same is payable,) that then it shall and may be lawful to and for the lord mayor of the city of *London* for the time being, upon oath to be made before him of such refusal or neglect, to give and grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable in the day-time, to levy the same tithes or sums of money so due, and in arrear and unpaid, by distress and sale of the goods of the party or parties so refusing or neglecting to pay, restoring to the owner or owners the overplus of such goods, over and above the said arrears of the said monies so due and unpaid, and the reasonable charges of making such distress, which he is to deduct out of the monies raised by sale of such goods.

XII. Provided always, and be it enacted, that in case the lord mayor, or court of aldermen, shall refuse or neglect to execute any of the respective powers to them by this act granted, or to perform all and every such thing relating either to the assessing or levying of the respective sums aforesaid, as they are by this act authorized and required to perform, that then it shall and may be lawful for the lord chancellor, or lord keeper of the great seal of *England* for the time being, or any two or more of the barons of his majesty's court of exchequer, by warrant or warrants under his or their respective hands and seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this present act, might or ought to have done, and by such warrant, either to empower any person or persons to make the respective assessments as aforesaid, or to authorize the respective officers or persons appointed to collect the sums aforesaid, to levy the same by distress and sale of the goods of any person or persons that shall refuse or neglect to pay the same, in manner and form aforesaid.

1670.

If the lord mayor refuse to execute this act, then who are appointed to execute it.

XIII. Provided always, and be it enacted, that where any of the parishes within the said city have, since the late fire, by death or otherwise, become vacant, the surviving or remaining incumbent of the other parish thereto united, or therewith consolidated, shall have and enjoy, and have like remedy to recover the tythes hereby settled to be paid, as if he had been actually presented, admitted, instituted, and inducted, into both the said parishes, since the union and consolidation thereof.

XIV. Provided always, that no court or judge ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due and owing, or to be paid by virtue of this act, or any part thereof, other than the persons hereby authorized to have cognizance thereof; nor shall it be lawful to or for any parson, vicar, curate, or incumbent, to convent or sue any person or persons assessed as aforesaid, and refusing or neglecting to pay the same in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act, for the hearing and determining of the same, in manner aforesaid.

[75]

No court whatsoever shall hold plea for any duty arising upon this act.

XV. Provided always, that it shall and may be lawful to and for the warden and minor canons of Saint *Paul's* church *London*, parson and proprietors of the rectory of the parish of Saint *Gregory* aforesaid, to receive and enjoy all tythes, oblations, and duties, arising or growing due within the said parish, in as large and beneficial manner as formerly they have, or lawfully might have done; any thing herein to the contrary notwithstanding.

An exception for St. Gregory's church, out of this act.

1696.

Stat. 7 & 8 W. III. c. 6. A.D. 1696.

An Act for the more easy Recovery of Small Tithes.

Continued
further for
7 years by
10 & 11
W. 3. c. 15.
and perpe-
tuated by
3 & 4 Ann.
c. 18. § 1.

Small tithes
not paid in
30 days af-
ter demand,
lawful to
complain to
2 justices,
not interest-
ed

* [76]

who may
summon
the persons
complained
of, and on
default of
appearance
determine
the com-
plaint, and
give allow-
ance with
costs not
exceeding
10s.

‘ For the more easy and effectual recovery of small tithes, and the value of them, where the same shall be unduly substracted and detained; where the same do not amount to above the yearly value of forty shillings from any one person;’ be it enacted by the king’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all and every person and persons shall henceforth well and truly set out and pay all and singular the tithes, commonly called Small Tithes, and compositions and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons, to whom they are or shall be due, in their several parishes within this kingdom of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, according to the rights, customs, and prescriptions, commonly used within the said parishes respectively; and if any person or persons shall hereafter substract or withdraw, or any ways fail in the true payment of such small tithes, offering, oblations, obventions, or compositions as aforesaid, by the space of twenty days at most after demand thereof, then it * shall and may be lawful for the person or persons, to whom the same shall be due, to make his or their complaint, in writing, unto two or more of his majesty’s justices of the peace within that county, riding, city, town corporate, place, or division, where the same shall grow due; neither of which justices of peace is to be patron of the church or chapel whence the said tithes do or shall arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid.

II. And be it further enacted by the authority aforesaid, that if hereafter any suit or complaint shall be brought to two or more justices of the peace as aforesaid, concerning small tithes, offerings, oblations, obventions, or compositions as aforesaid, the said justices are hereby authorized and required to summon, in writing under their hands and seals, by reasonable warning, every such person or persons against whom any complaint shall be made as aforesaid; and after his or their appearance, or upon default of their appearance, the said warning or summons being proved before them upon oath, the said justices of peace, or any two or more of them, shall proceed to hear and determine the said complaint, and upon the proofs, evidences, and testimonies, produced before them, shall, in writing under their hands and seals, adjudge the case, and give such reasonable allowance and compensation for such tithes,

oblations, and compositions so substracted or withheld, as they shall judge to be just and reasonable, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just.

1696.

III. And be it further enacted, that if any person or persons shall refuse or neglect, by the space of ten days after notice given, to pay or satisfy any such sum of money, as upon such complaint and proceeding shall, by two or more justices of the peace, be adjudged as aforesaid, in every such case, the constables and churchwardens of the said parish, or one of them, shall, by warrant under the hands and seals of the said justices to them directed, distrain the goods and chattels of the party so refusing or neglecting as aforesaid, and after detaining them by the space of three days, in case the said sum so adjudged to be paid, together with reasonable charges for making and detaining the said distress, be not tendred or paid by the said party in the mean time, shall and may make public sale of the same, and pay to the party complaining so much of the money arising by such sale, as may satisfy the said sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress, as the said justice shall think fit, and shall render the overplus (if any be) to the owner.

On refusal to pay in 10 days after notice, the constables, &c. may distrain, and after 3 days sell the same, and satisfy the sum and charges, rendering the overplus.

[77]

IV. Provided always, and be it enacted, that it shall and may be lawful for all justices of peace, in the examination of all matters offered to them by this act, to administer an oath or oaths to any witness or witnesses, where the same shall be necessary for their information, and for the better discovery of the truth.

Justices to administer an oath.

V. Provided also, and be it enacted, that this act, or any thing herein contained, shall not extend to any tithes, oblations, payments, or obventions, within the city of *London*, or liberties thereof, nor to any other city or town corporate where the same are settled by any act of parliament in that case particularly made and provided.

Not to extend to London, nor any place otherwise settled by parliament.

VI. Provided also, and be it enacted, that no complaint for or concerning any small tithes, offerings, oblations, obventions, or compositions hereafter due, shall be heard and determined by any justices of the peace, by virtue of this act, unless the complaint shall be made within the space of two years next after the times that the same tithes, oblations, obventions, and compositions, did become due or payable; any thing in this act contained to the contrary notwithstanding.

No complaint to be heard, unless made within 2 years.

VII. Provided also, and be it enacted, that any person finding him, her, or themselves aggrieved by any judgment to be given by any two justices of the peace, shall and may appeal to the next general quarter sessions to be held for that county, riding, city, town corporate or division, and the justices of the peace there pre-

Persons aggrieved to appeal to the sessions, who are to determine the matter.

1696.

If judgment be confirmed, justices to give costs.

No judgment to be removed, unless the title be in question.

[78]

Persons complained of, insisting on any composition, &c. and giving security to pay costs, justices not to give judgment.

And complainant may prosecute in any other court.

Judgment to be inrolled at the next sessions by the clerk of the peace,

sent, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if the justices then present, or the major part of them, shall find cause to confirm the judgment given by the first two justices of the peace, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable; and no proceedings or judgment had, or to be had by virtue of this act, shall be removed or superseded by virtue of any writ of *certiorari*, or other writ out of his majesty's courts at *Westminster*, or any other court whatsoever, unless the title of such tithes, oblations, or obventions, shall be in question; any law, statute, custom, or usage, to the contrary notwithstanding.

VIII. Provided always, and be it enacted, that where any person or persons complained of for subtracting or withholding any small tithes, or other duties aforesaid, shall before the justices of the peace to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he or she is or ought to be freed from payment of the said tithes, or other dues in question, and deliver the same in writing to the said justices of the peace, subscribed by him or her, and shall then give to the party complaining reasonable and sufficient security, to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose, in any of his majesty's courts having cognizance of that matter, shall be given against him, her, or them, in case the said prescription, composition, or *modus decimandi*, shall not upon the said trial be allowed; that in that case the said justices of the peace shall forbear to give any judgment in the matter; and that then and in such case the person or persons so complaining shall and may be at liberty to prosecute such person or persons for their said subtraction in any other court or courts whatsoever, where he, she, or they might have sued before the making of this act; any thing in this act to the contrary notwithstanding.

IX. And be it further enacted by the authority aforesaid, that every person and persons, who shall by virtue of this act obtain any judgment, or against whom any judgment shall be obtained, before any justices of the peace out of sessions, for small tithes, oblations, obventions, or compositions, shall cause or procure the said judgment to be inrolled at the next general quarter sessions to be holden for the said county, city, riding, or division; and the clerk of the peace for the said county, city, riding, or division, is hereby required, upon tender thereof, to inroll the same; and that he shall not ask or receive for the inrollment of any one judgment

any fee or reward exceeding one shilling; and that the judgment so inrolled, and satisfaction made by paying the same sum so adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons, from any other remedy for the said small tithes, oblations, obventions, or compositions, for which the said judgment was obtained. 1696.

and to bar vicars from any other remedy.

X. And be it further enacted by the authority aforesaid, that if any person or persons, against whom any such judgment or judgments shall be had as aforesaid, shall remove out of the county, * riding, city, or corporation, after judgment had as aforesaid, and before the levying the sum or sums thereby adjudged to be levied, the justices of the peace who made the said judgment, or one of them, shall certify the same, under his or their hands and seals, to any justice of peace of such other county, city, or place, wherein the said person or persons shall be inhabitants; which said justice is hereby authorized and required, by warrant under his hand and seal, to be directed to the constables or churchwardens of the place, or one of them, to levy the sum or sums so adjudged to be levied as aforesaid, upon the goods and chattels of such person or persons, as fully as the said other justices might have done, if he, she, or they had not removed as aforesaid; which shall be paid according to the said judgment.

Persons removing, justices may certify the judgment, and other justices by warrant may levy the sum adjudged.

* [79]

XI. Provided always, and be it enacted, that no vicar or other person shall have remedy to recover small tithes, or other dues aforesaid, which became or were due before the making of this act, unless complaint be made to the justices of the peace in form aforesaid, before the first day of *October*, which shall be in the year of our Lord one thousand six hundred ninety-six.

Small tithes to be recovered before 1st October 1696.

XII. And it is hereby declared and enacted, that the said justices of the peace, who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious; which costs shall be levied in manner and form aforesaid.

Justices may give costs not exceeding 10s.

XIII. Provided also, and be it further enacted, that if any person or persons shall be sued for any thing done in execution of this act, and the plaintiff in such suit discontinue his action, or be nonsuit, or a verdict pass against him, that then, in any of the said cases, such person or persons shall recover double costs.

If the plaintiff be nonsuit, person sued to have double costs.

XIV. Provided always, that any clerk, or other person or persons, who shall begin any suit for recovery of small tithes, oblations, or obventions, not exceeding the value of forty shillings, in his majesty's court of exchequer, or in any of the ecclesiastical courts, shall have no benefit by this act, or any clause in it, for the same matter for which he or they have so sued.

Suits for tithes not exceeding 40s. to have no benefit by this act.

1696.

Act to continue 3 years.

XV. Provided always, and be it further enacted, that this act shall continue for the space of three years, and from thence to the end of the next session of parliament, and no longer.

[80]

Stat. 7 & 8 W. III. c. 34. A. D. 1696.

Quakers refusing to pay tythes or church-rates.

IV. WHEREAS by reason of a pretended scruple of conscience, quakers do refuse to pay tythes and church-rates, be it enacted by the authority aforesaid, that where any quaker shall refuse to pay, or compound for his great or small tythes, or to pay any church-rates, it shall and may be lawful to and for the two next justices of peace of the same county, (other than such justice of the peace as is patron of the church or chapel whence the said tythes do or shall arise, or any ways interested in the said tythes,) upon the complaint of any parson, vicar, farmer, or proprietor of tythes, church-warden or churchwardens, who ought to have, receive, or collect the same, by warrant under their hands and seals, to convene before them such quaker or quakers neglecting or refusing to pay or compound for the same, and to examine upon oath, (which oath the said justices are hereby empowered to administer,) or in such manner as by this act is provided, the truth and justice of the said complaint, and to ascertain and state what is due and payable by such quaker or quakers to the party or parties complaining, and by order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered, as aforesaid, do not exceed ten pounds; and upon refusal by such quaker or quakers to pay according to such order, it shall and may be lawful to and for any one of the said justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, by distress and sale of goods of such offender, his executors or administrators, rendring only the overplus to him, her, or them, necessary charges of distraining being thereout first deducted and allowed by the said justice; and any person finding him, her, or themselves, aggrieved by any judgment given by such two justices of the peace, shall and may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate; and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if the justices then present, or the major part of them, shall find cause to continue the judgment given by the first two justices of the peace, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable; and no proceedings or judgment had or to be

Justices on stating what is due, may direct payment.

On refusal, to levy by distress.

Persons aggrieved may appeal to the quarter sessions, who are finally to determine.

If judgment be continued, to give costs.

[81]

had by virtue of this act, shall be removed or superseded by any writ of *certiorari*, or other writ out of his majesty's courts at *Westminster*, or any other court whatsoever, unless the title of such tythes shall be in question.

1696.

No judgment to be superseded.

V. Provided always, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined.

No distress till appeal be determined.

VII. Provided, that this act shall continue in force for the space of seven years, and from thence to the end of the next session of parliament, and no longer. [*Extended to all ecclesiastical dues, by 1 G. 1. c. 6. § 2.*]

Stat. 11 & 12 W. III. c. 16. A.D. 1699.

An Act for the better ascertaining the Tythes of Hemp and Flax.

‘ WHEREAS an act, made in the third year of the reign of his majesty and the late queen, intituled, *An act for the better ascertaining the tythes of hemp and flax*, was made to continue but for seven years, and to the end of the next session of parliament after such term ended, and is now expired: and whereas the said act hath by experience been found very useful and necessary; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, from and after the five and twentieth day of *March*, which shall be in the year of our lord one thousand seven hundred, all and every person or persons, who shall sow or cause to be sown any hemp or flax in any parish or place in the kingdom of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, shall pay or cause to be paid to every parson, vicar, or impropriator of any such parish or place, yearly and every year, the sum of five shillings, and no more, for each acre of hemp and flax so sown, before the same be carried off the ground, and so proportionably for more or less ground so sown: for the recovery of which sum or sums of money, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of the land.

Preamble.

Cap 3.

Ground sown with flax or hemp, to pay 5s. per acre.

II. Provided, that this act, or any thing therein contained, shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or otherwise discharged of tythes by law.

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Lands discharged by *modus decimandi* not to be charged.

III. Provided always, that nothing herein contained shall extend, or be construed to extend, to make any alteration in the right or manner of payment of tythes of flax and hemp to any ecclesiastical person, incumbent of any parsonage or curacy, or to

Not to alter payment of tythes for ground

1765.

Leases already made, or that shall be made, by ecclesiastical persons, of tythes and other incorporeal hereditaments for life or lives, or years, declared to be good in law,

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as those granted by virtue of act 32 Hen. 8.

Masters and fellows of colleges, &c. disabled from granting leases

ing the same, and enabling the said archbishops and bishops, masters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other ecclesiastical persons, to make valid leases of such their incorporeal hereditaments, and to recover the rents or yearly sum mentioned to be reserved on any leases by them already granted, or to be granted, for one, two, or three lives, as aforesaid; and also to make good and effectual all such leases as have already been granted by them, or any of them; may it please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all leases for one, two, or three life or lives, or any term not exceeding twenty-one years, already made and granted, or which shall at any time, from and after the passing of this act, be made or granted, of any tythes, tolls, or other incorporeal hereditaments, solely, and without any lands, or corporeal hereditaments, by any archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons who are enabled by the several statutes now in being, or any of them, to make any lease or leases for one, two, or three life or lives, or any term or number of years, not exceeding twenty-one years, of any lands, tenements, or other corporeal hereditaments, shall be, and are hereby deemed and declared to be, as good and effectual in law against such archbishop, bishop, masters, and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons so granting the same, and their successors, and every of them, to all intents and purposes, as any lease or leases already made or to be made by any such archbishop or bishop, master and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons having spiritual promotion, of any lands or other corporeal hereditaments now are, by virtue of the statute of the thirty-second year of king *Henry* the eighth, or any other statute now in being; any law, custom, or usage, to the contrary thereof in anywise notwithstanding.

II. Provided always, that nothing herein contained shall extend, or be construed to extend, to enable any master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or

other ecclesiastical persons as aforesaid, to grant leases for any longer or other terms than, by the local statutes of their several foundations, they are now respectively enabled to do.

III. And be it further enacted and declared by the authority aforesaid, that in case the rent or rents, or yearly sum or sums, reserved or made payable in or by any lease or leases already made or to be made by any archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons so enabled to make leases as aforesaid, for one, two, or three life or lives, or years, in pursuance of the several acts of parliament already in being, or by this present act, or any part thereof, shall be behind or unpaid by the space of twenty-eight days next over or after any of the days whereon the same, by such lease or leases, now are or hereafter shall or may be reserved and made payable, then, and so often, and from time to time, as it shall so happen, it shall and may be lawful for such archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, prebendaries, precentors, masters and guardians of hospitals, and other persons so making or granting, or having made or granted, such leases as aforesaid, or their executors, administrators, and successors respectively, to bring an action or actions of debt against the lessee or lessees to whom any such lease or leases for life or lives, or years, now are or hereafter shall be made and granted, his, her, or their heirs, executors, administrators, or assigns, for recovering the rent or rents which shall be then due and in arrear to any such archbishop or bishops, masters and fellows, or other heads and members of colleges or halls, deans, chapters, precentors, prebendaries, master and guardians of hospitals, and other person or persons before mentioned, his or their executors, administrators, or successors, in such and the same manner, and as fully and effectually to all intents and purposes, as any landlord or lessor, or other person or persons, could or might do for the recovering of arrears of rent due on any lease or leases for life or lives, or years, by the laws now in being; any law, statute, usage, or custom, to the contrary notwithstanding.

IV. And it is hereby further enacted and declared by the authority aforesaid, that this act shall be deemed and taken to be a publick act; and shall be judicially taken notice of as such, in all courts of law and equity, without specially pleading the same.

1765.

for any longer term than their statutes allow.

Actions may be brought for recovery of rents reserved and in arrear on leases for life or lives.

[86]

Publick act.

1804.

Stat. 44 Geo. III. c. 89. A. D. 1804.

An Act for the Relief of certain Incumbents of Livings in the City
of *London*.

32 & 3
C. 2.

WHEREAS by an act, passed in the twenty-second and twenty-third years of the reign of his late majesty king *Charles* the Second, intituled, *An act for the better settlement of the maintenance of the parsons, vicars, and curates, in the parishes of the city of London, burnt by the late dreadful fire there*, after reciting that the tythes in the city of *London* were levied and paid with great inequality, and were, since the late dreadful fire there, in the rebuilding of the same, by taking away of some houses, altering the foundations of many, and the new erecting of others, so disordered, that, in case they should not for the time to come be reduced to a certainty, many controversies and suits at law might thence arise; it was enacted, that the annual certain tythes of all and every parish and parishes within the said city of *London* and the liberties thereof, whose churches had been demolished or in part consumed by the late fire, and which said parishes, by virtue of an act of that parliament, intituled, *An additional act for rebuilding of the city of London, uniting of parishes, and rebuilding of the cathedral and parochial churches within the said city*, remained and continued single as theretofore they were, or were by the said act annexed or united into one parish respectively, should be as followeth, (that is to say) the annual certain tythes or sum of money in lieu of tythes,

1. Of the parish of *Alhallows Lombard Street*, one hundred and ten pounds;
2. Of *St. Bartholomew Exchange*, one hundred pounds;
3. Of *St. Bridget*, alias *Brides*, one hundred and twenty pounds;
4. Of *St. Bennet Fink*, one hundred pounds;
5. Of *St. Michael Crooked Lane*, one hundred pounds;
6. Of *St. Christopher*, one hundred and twenty pounds;
7. Of *St. Dionis Back Church*, one hundred and twenty pounds;
8. Of *St. Dunstan in the East*, two hundred pounds;
9. Of *St. James Garlick Hythe*, one hundred pounds;
10. Of *St. Michael Cornhill*, one hundred and forty pounds;
11. Of *St. Michael Bassishaw*, one hundred and thirty-two pounds eleven shillings;
12. Of *St. Margaret Lothbury*, one hundred pounds;
13. Of *St. Mary Aldermanbury*, one hundred and fifty pounds;
14. Of *St. Martin Ludgate*, one hundred and sixty pounds;
15. Of *St. Peter Cornhill*, one hundred and ten pounds;

16. Of *St. Stephen Coleman Street*, one hundred and ten pounds; 1804.
17. Of *St. Sepulchre*, two hundred pounds;
18. Of *Alhallows Bread Street*, and *St. John Evangelist*, one hundred and forty pounds;
19. Of *Alhallows the Great* and *Alhallows the Less*, two hundred pounds;
20. Of *St. Albans Wood Street* and *St. Olaves Silver Street*, one hundred and seventy pounds;
21. Of *St. Anne and Agnes* and *St. John Zachary*, one hundred and forty pounds;
22. Of *St. Augustin* and *St. Faith*, one hundred and seventy-two pounds;
23. Of *St. Andrew Wardrobe* and *St. Ann Blackfriars*, one hundred and forty pounds;
24. Of *St. Antholin* and *St. John Baptist*, one hundred and twenty pounds;
25. Of *St. Bennet Gracechurch* and *St. Leonard Eastcheap*, one hundred and forty pounds;
26. Of *St. Bennet Paul's Wharf* and *St. Peter Paul's Wharf*, one hundred pounds;
27. Of *Christ Church* and *St. Leonard Foster Lane*, two hundred pounds;
28. Of *St. Edmond the King* and *St. Nicholas Acons*, one hundred and eighty pounds;
29. Of *St. George Botolph Lane* and *St. Botolph Billingsgate*, one hundred and eighty pounds;
30. Of *St. Laurence Jewry* and *St. Magdalen Milk Street*, one hundred and twenty pounds;
31. Of *St. Magnus* and *St. Margaret New Fish Street*, one hundred and seventy pounds;
32. Of *St. Michael Royal* and *St. Martin Vintry*, one hundred and forty pounds;
33. Of *St. Matthew Friday Street* and *St. Peter Cheap*, one hundred and fifty pounds;
34. Of *St. Margaret Pattons* and *St. Gabriel Fenchurch*, one hundred and twenty pounds;
35. Of *St. Mary at Hill* and *St. Andrew Hubbard*, two hundred pounds;
36. Of *St. Mary Woolnoth* and *St. Mary Woolchurch*, one hundred and sixty pounds;
37. Of *St. Clement Eastcheap* and *St. Martin Orgars*, one hundred and forty pounds;
38. Of *St. Mary Abchurch* and *St. Lawrence Pountney*, one hundred and twenty pounds;

1804.

39. Of *St. Mary Aldermary* and *St. Thomas Apostle*, one hundred and fifty pounds ;
40. Of *St. Mary Le Bow*, *St. Pancras Soper Lane*, and *Alhallows Honey Lane*, two hundred pounds ;
41. Of *St. Mildred Poultry* and *St. Mary Cole Church*, one hundred and seventy pounds ;
42. Of *St. Michael Wood Street* and *St. Mary Staining*, one hundred pounds ;
43. Of *St. Mildred Bread Street* and *St. Margaret Moses*, one hundred and thirty pounds ;
44. Of *St. Michael Queenkythe* and *Trinity*, one hundred and sixty pounds ;
45. Of *St. Magdalen Old Fish Street*, and *St. Gregory*, one hundred and twenty pounds ;
46. Of *St. Mary Somerset* and *St. Mary Mounthaw*, one hundred and ten pounds ;
47. Of *St. Nicholas Coleabby* and *St. Nicholas Olaves*, one hundred and thirty pounds ;
48. Of *St. Olave Jewry* and *St. Martin Ironmonger Lane*, one hundred and twenty pounds ;
49. Of *St. Stephen Walbrook* and *St. Bennet Sheerhog*, one hundred pounds ;
50. Of *St. Swithin* and *St. Mary Bothaw*, one hundred and forty pounds.
51. Of *St. Vedast*, alias *Forsters* and *St. Michael Quern*, one hundred and sixty pounds ;

which respective sums of money to be paid in lieu of tythes within the said respective parishes; and assessed as thereafter is directed, should be and continue to be esteemed, deemed, and taken, to all intents and purposes, to be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests to the respective parson, vicar, and curate of any parish for the time being, or to his or their respective successors, or to other persons for his or their use) of the said respective parsons, vicars, and curates, who should be legally instituted, inducted, and admitted, into the respective parishes aforesaid : and that the said several sums of money for tythes might be more equally assessed upon the several houses, buildings, and all other hereditaments whatsoever within all the said respective parishes, it was enacted, that the alderman of such respective ward or wards within the said city wherein any of the said parishes respectively lay, and his or their deputy or deputies, and the common councilmen of such respective ward or wards, with the churchwardens and one or more of the

1804.

parishioners of such respective parish wherein the maintenance aforesaid was respectively to be assessed, to be nominated by such respective alderman, deputy, common councilmen, and churchwardens, or any five of them, whereof the alderman or his deputy to be one, should, in the manner therein directed, assemble and meet together; and that they, or the major part of them so assembled, should proportionably assess upon all houses, shops, warehouses and cellars, wharfs, keys, cranes, waterhouses, (which waterhouses should pay in their respective parishes where they stood, and not elsewhere) and tofts of ground (remaining unbuilt) and all other hereditaments whatsoever (except parsonage and vicarage houses) the whole respective sum by that act appointed, or so much of it as was more than what each impropiator was by that act enjoined respectively to allow, in the most equal way that the said assessors, according to the best of their judgements, could make it; and such regulations were made for effecting the purposes of the said act as therein are mentioned: and it was amongst other things further enacted, that for the surer and better payment of the said respective sums of money so to be assessed and taxed towards the raising of the said maintenance of the respective parsons, vicars, and curates of the said respective parishes as aforesaid, all and every such respective sum and sums of money so to be assessed and taxed as aforesaid, towards the raising of the said maintenance of the said respective parsons, vicars, and curates of the said respective parishes, should be paid to the said respective parsons, vicars, and curates, and their successors respectively, at the four usual feasts, (that is to say,) at the annunciation of the blessed virgin *Mary*, the nativity of *St. John the Baptist*, the feast of *St. Michael the Archangel*, and the nativity of our blessed Saviour; or within fourteen days after each of the said feasts, by equal payments: and in any parish or parishes where any impropriations were, it was enacted, that all and every the impropiator or impropiators of any of the said parishes, should pay and allow what really and *bonâ fide* they had used and ought to pay and satisfy to the respective incumbent of such respective parish, at any time before the said late fire, and that the same should be esteemed and computed as part of the maintenance of such incumbent, notwithstanding that act or any clause or matter or thing therein contained: and whereas, since the passing of the said recited act the rectory of the aforesaid parish of *St. Christopher* hath, by an act passed in the twenty-first year of the reign of his present majesty, been united to the rectory of the aforesaid parish of *St. Margaret Lothbury*, and there is now but one incumbent of the said united rectories: and whereas the said recited act hath failed in providing a proper maintenance for the parsons, vicars, and curates in the

1804.

For increasing the annual tythes of the parishes within the city of London.

said parishes, inasmuch as the respective incomes being by the said act fixed at very low rates, the same are, by the decreased value of money, the enhanced price of all the necessaries of life, and by various other circumstances peculiarly attached to the incumbents of the city of *London*, become greatly insufficient for the due support of their situation and character; it hath been therefore deemed expedient for their relief to make such alterations in the said in part recited act as are hereinafter expressed and contained; be it therefore enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that instead of the annual tythes of all and every parish and parishes within the city of *London* and the liberties thereof, whose churches were demolished or in part consumed by the fire mentioned in the said recited act, the annual certain tythes or sums of money in lieu of tythes, of and for the parish and parishes within the said city and liberties hereinafter enumerated, shall, from and after the twenty-ninth day of *September*, one thousand eight hundred and four, be as follows; (that is to say),

1. Of the parish of *Alhallows Lombard Street*, two hundred pounds;
2. Of *St. Bartholomew Exchange*, two hundred pounds;
3. Of *St. Bridget*, alias *Brides*, two hundred pounds;
4. Of *St. Bennet Fink*, two hundred pounds;
5. Of *St. Michael Crooked Lane*, two hundred pounds;
6. Of *St. Dionis Back Church*, two hundred pounds;
7. Of *St. Dunstan in the East*, three hundred and thirty-three pounds six shillings and eight-pence;
8. Of *St. James Garlick Hythe*, two hundred pounds;
9. Of *St. Michael Cornhill*, two hundred and thirty-three pounds six shillings and eight-pence;
10. Of *St. Michael Bassishaw*, two hundred and twenty pounds eighteen shillings and four-pence;
11. Of *St. Mary Aldermanbury*, two hundred and fifty pounds;
12. Of *St. Martin Ludgate*, two hundred and sixty-six pounds thirteen shillings and four-pence;
13. Of *St. Peter Cornhill*, two hundred pounds;
14. Of *St. Stephen Coleman Street*, two hundred pounds;
15. Of *St. Sepulchre*, three hundred and thirty-three pounds six shillings and eight-pence;
16. Of *Alhallows Bread Street* and *St. John Evangelist*, two hundred and thirty-three pounds six shillings and eight-pence.
17. Of *Alhallows the Great* and *Alhallows the Less*, three hundred and thirty-three pounds six shillings and eight-pence;

18. Of *St. Albans Wood Street* and *St. Olaves Silver Street*, two hundred and eighty-three pounds six shillings and eight-pence; 1804.
19. Of *St. Ann and Agnes* and *St. John Zachary*, two hundred and thirty-three pounds six shillings and eight-pence;
20. Of *St. Augustin* and *St. Faith*, two hundred and eighty-six pounds thirteen shillings and four-pence;
21. Of *St. Andrew Wardrobe* and *St. Anne Blackfriars*, two hundred and thirty-three pounds six shillings and eight-pence;
22. Of *St. Antholin* and *St. John Baptist*, two hundred pounds;
23. Of *St. Bennet Grace Church* and *St. Leonard East Cheap*, two hundred and thirty-three pounds six shillings and eight-pence;
24. Of *St. Bennet Paul's Wharf* and *St. Peter Paul's Wharf*, two hundred pounds;
25. Of *Christ Church* and *St. Leonard Foster Lane*, three hundred and thirty-three pounds six shillings and eight-pence;
26. Of *St. Edmund the King* and *St. Nicholas Acons*, three hundred pounds;
27. Of *St. George Botolph Lane*, and *St. Botolph Billingsgate*, three hundred pounds;
28. Of *St. Lawrence Jewry* and *St. Magdalen Milk Street*, two hundred pounds;
29. Of *St. Margaret Lothbury* and *St. Christopher*, three hundred and sixty-six pounds thirteen shillings and four-pence;
30. Of *St. Magnus* and *St. Margaret New Fish Street*, two hundred and eighty-three pounds six shillings and eight-pence;
31. Of *St. Michael Royal* and *St. Martin Vintry*, two hundred and thirty-three pounds six shillings and eight-pence;
32. Of *St. Matthew Friday Street* and *St. Peter Cheap*, two hundred and fifty pounds;
33. Of *St. Margaret Pattons* and *St. Gabriel Fen Church*, two hundred pounds;
34. Of *St. Mary at Hill* and *St. Andrew Hubbard*, three hundred and thirty-three pounds six shillings and eight-pence;
35. Of *St. Mary Woolnoth* and *St. Mary Woolchurch*, two hundred and sixty-six pounds thirteen shillings and four-pence;
36. Of *St. Clement Eastcheap* and *St. Martin Orgars*, two hundred and thirty-three pounds six shillings and eight-pence;
37. Of *St. Mary Abchurch* and *St. Lawrence Pountney*, two hundred pounds;
38. Of *St. Mary Aldermay* and *St. Thomas Apostles*, two hundred and fifty pounds;
39. Of *St. Mary le Bow*, *St. Pancras Soper Lane*, and *Alhallows Honey lane*, three hundred and thirty-three pounds six shillings and eight-pence;

1804.

40. Of *St. Mildred Poultry* and *St. Mary Colechurch*, two hundred and eighty-three pounds six shillings and eight-pence;

41. Of *St. Michael Wood Street* and *St. Mary Staining*, two hundred pounds;

42. Of *St. Mildred Bread Street* and *St. Margaret Moses*, two hundred and sixteen pounds thirteen shillings and four-pence;

43. *St. Michael Queenhithe* and *Trinity*, two hundred and sixty-six pounds thirteen shillings and four-pence;

44. Of *St. Magdalen Old Fish Street* and *St. Gregory*, two hundred pounds;

45. Of *St. Mary Somerset* and *St. Mary Mounthaw*, two hundred pounds;

46. Of *St. Nicholas Coleabby* and *St. Nicholas Olaves*, two hundred and sixteen pounds thirteen shillings and four-pence;

47. Of *St. Olave Jewry* and *St. Martin Ironmonger Lane*, two hundred pounds;

48. Of *St. Stephen Walbrook* and *St. Bennet Sheerbeg*, two hundred pounds;

49. Of *St. Swithin* and *St. Mary Bothaw*, two hundred and thirty-three pounds six shillings and eight-pence;

50. Of *St. Vedast* alias *Fosters* and *St. Michael Quern*, two hundred and sixty-six pounds thirteen shillings and four-pence.

Declaring the said sums of money to be the annual maintenance of the clergy of the city.

II. And be it further enacted, that the said respective sums of money to be paid in lieu of tythes within the said respective parishes, shall be and continue to be esteemed, deemed, and taken, to all intents and purposes, to be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests, to the respective parson, vicar, and curate of any parish for the time being, or to his or their respective successors, or to other persons for his or their use) of the said respective parsons, vicars, and curates, legally instituted, inducted, and admitted into the respective parishes aforesaid.

Power to make assessments, and other buildings.

III. And, in order that the said several sums of money in lieu of tythes may be more equally assessed upon the several houses, buildings, and all other hereditaments whatsoever, within all the said parishes, be it further enacted, that the alderman or aldermen of such respective ward or wards, within the said city, wherein any of the said parishes respectively lie, and his or their deputy or deputies, and the common councilmen of such respective ward or wards with the churchwardens or churchwarden, if there should be only one, and any one or more of the parishioners of the respective parish wherein the maintenance aforesaid is respectively to be assessed, to be nominated by such alderman or aldermen, deputy or

1804.

deputies, common councilmen and churchwardens or churchwarden, or any five or more of them, whereof the alderman or aldermen, or his or their deputy or deputies, to be one or two, shall at some convenient and seasonable time before the thirty-first day of *July* next after the passing of this act, assemble and meet together in some convenient place, within every of the respective parishes, wherein the maintenance aforesaid is to be assessed, and the said alderman or aldermen, deputy or deputies, common councilmen, and churchwardens or churchwarden, and parishioner or parishioners, to be nominated as aforesaid, or the major part of them so assembled, shall proportionably assess upon all houses, shops, warehouses, and cellars, wharfs, keys, cranes, waterhouses (which waterhouses shall pay in the respective parishes where they stand, and not elsewhere), and tofts of ground remaining unbuilt, and all other hereditaments whatsoever, (except parsonage and vicarage houses), the whole respective sum by this act appointed, or so much of it as shall exceed what each impropiator is herein-after by this act enjoined respectively to allow in the most equal way that the said assessors, according to the best of their judgement, can make it; which said assessments shall be made and finished before the twenty-first day of *August* then next ensuing.

IV. And be it further enacted, that if any doubt or variance shall happen to arise about any sum so assessed as aforesaid, or if any parishioner or parishioners, or owner or owners of any house or other hereditaments hereby directed to be assessed within any of the said parishes, shall find himself, herself, or themselves aggrieved by the assessing of any sum or sums of money, in manner and form aforesaid, then upon complaint made by the party or parties aggrieved, to the lord mayor and court of aldermen of the said city, within fourteen days after notice given to the party or parties of such assessment made, the said lord mayor and court of aldermen summoning as well the party or parties aggrieved, as the alderman or aldermen, or deputy or deputies, common councilmen, churchwardens or churchwarden, and such others as shall make the said assessment, or the survivors of them, shall hear and determine the same, in a summary way, and the judgement by them given shall be final and without appeal; and if no such parishioner or parishioners shall be nominated in the manner and for the purpose aforesaid, or being so nominated, if the said alderman or aldermen, deputy or deputies, common councilmen, churchwardens or churchwarden, and parishioner or parishioners so appointed, shall after summons and request made in that behalf unto them by the lord mayor and court of aldermen, or the incumbent or incumbents of any of the said respective parishes, refuse or neglect to meet and make such assessments as aforesaid, then and in either of

Appeal to the lord mayor and court of aldermen against assessments.

1804. such cases it shall and may be lawful to and for the lord mayor and court of aldermen of the said city, and they are hereby required on application of the incumbent or incumbents of the said respective parishes, to authorize and appoint any other person or persons to make such assessment or assessments for the purposes aforesaid.

Assess-
ments may
be altered
every 7
years.

V. And be it further enacted, that if in all or any of the aforesaid parishes it shall appear necessary to the parishioners specially convened by the churchwardens or churchwarden for the purpose, and assembled in vestry, at the end of seven years from the time of passing this act, and so from time to time at the expiration of every seven years, afterwards to review and alter the respective assessments to be made in pursuance of this act, and to make in all or any of the said parishes, a new assessment and rate, or assessments and rates, in lieu of the then preceding assessments for the purpose of raising the sum and sums of money by this act directed to be raised and paid as aforesaid, then that the alderman or aldermen of the respective ward or wards within the said city, wherein such parish or parishes shall respectively lie, and his or their deputy or deputies, and the common councilmen of such respective ward or wards, with the churchwardens or churchwarden, and one or more of the parishioners of the respective parish wherein such assessment shall appear necessary (which parishioner or parishioners shall be nominated as before directed), shall in like manner as herein-before is mentioned, assemble and meet together within fourteen days after such nomination, and they or the major part of them so assembled, shall then and there proportionably assess and rate upon the respective houses and other hereditaments hereby directed to be assessed, the respective sums by this act directed to be raised and paid as herein-before is mentioned, and that every such new assessment and rate shall be liable to the like appeals as aforesaid, and shall be collected, levied, and paid in like manner as the first assessment or rate mentioned in this act may or ought to be collected, levied, and paid.

Four trans-
cripts to be
made, and
directed
where to be
deposited.

VI. And be it further enacted, that the said assessors within fourteen days after any assessment shall have been made, and the respective appeals (if any be) determined, shall make four transcripts thereof in writing, containing the respective sums to be payable or appointed to be paid out of all and every the premises assessable within such respective parish, and subscribe the same with their respective names, and that within twenty days after such subscription as aforesaid, one of the said transcripts shall be sent to the lord mayor of the city of *London*, and deposited in the town clerk's office of the said city, and there kept and preserved among the records of the said city, for a perpetual memorial thereof;

another of the said transcripts shall be deposited in the registry of the consistory court of the lord bishop of *London*, to be kept and preserved as aforesaid; another of the said transcripts shall remain and be kept in the vestry of such respective parish, for a perpetual memorial as before mentioned; and the remaining transcript shall be delivered within three days after such subscription to the incumbent of such respective parish, and the said assessments shall continue in force and be acted upon until any new assessment shall be made in pursuance of this act.

1804.

VII. And, for the further and better payment of the said respective sums of money so to be assessed or taxed, towards raising the maintenance of the said respective parsons, vicars, and curates of the said respective parishes as aforesaid; be it further enacted, that all and every such respective sum and sums of money so to be assessed and taxed as aforesaid towards the raising of the said maintenance, shall be payable to the said respective parsons, vicars, and curates of the said respective parishes, and their successors respectively or their agents, receivers, or collectors, on the following days in every year, that is to say, the twenty-fifth day of *December*, the twenty-fifth day of *March*, the twenty-fourth day of *June*, and the twenty-ninth day of *September*, or within thirty days after each of the said days, by equal payments free and clear of all manner of taxes, assessments, and deductions whatsoever, affecting the said respective sums of money.

Fixing the time for payment of sums assessed.

VIII. And whereas in certain of the parishes herein-before named there are impropriations; and the impropriators were, as herein-before is mentioned by the said recited act, directed to pay and allow what really and *bond fide* they had used and ought to have paid and satisfied to the respective incumbents of the said parishes before the said fire, which said payments were to be esteemed and computed as part of the maintenance of such incumbents; be it therefore further enacted, that in the parishes of *St. Bridget* otherwise *St. Bride's*, *St. Bennet Fink*, *St. Mary Aldermanbury*, *St. Stephen Coleman Street*, *Alhallows the Less*, *Christ Church*, *St. Lawrence Jewry*, *St. Lawrence Pountney*, and *St. Mary Cole Church*, the impropriators shall continue to allow and pay to the respective incumbents of the same parishes what they have been accustomed to allow and pay before and since the passing of the said recited act of the twenty-second and twenty-third years of the reign of king *Charles the second*, which said sums shall be paid to the incumbents of the same respective parishes, in part of the respective sums herein-before appointed to be the certain annual maintenance of the same respective incumbents.

Impropriators to continue to pay what they have been accustomed to pay.

IX. And whereas two-third parts of the impropriate tythes of the parish of *St. Sepulchre* are vested in trustees, in trust for the

Directing the vicar of Saint Sepul.

1804.
 chre's to re-
 ceive the
 full sum
 directed by
 this act, in-
 stead of the
 one third
 part of the
 impropriate
 tythes he is
 entitled to.

parishioners of that parish; and the vicar of the said parish is endowed with the remaining third part of the said impropriate tythes; be it therefore further enacted, that the said vicar shall, from and after the twenty-ninth day of *September* one thousand eight hundred and four, receive the full sum directed by this act to be paid him for his maintenance, in lieu of the third part of the said impropriate tythes to which by virtue of his endowment he is entitled from the several inhabitants, of or from or out of, or for, or in respect of the several houses, tenements, and other hereditaments situated within that part of the said parish of *St. Sepulchre* which lies within the liberties of the city of *London*, but exclusive of and over and above the third part of the tythes to which he is entitled, from the inhabitants of, or from, or out of, or for or in respect of the several houses, tenements, or other hereditaments situate within that part of the said parish which lies within the county of *Middlesex*; and that, from and after the said twenty-ninth day of *September* one thousand eight hundred and four, the said third part of the said impropriate tythes, due from the inhabitants of or from, or out of, or in respect of the several houses, tenements, or other hereditaments situate within that part of the said parish of *St. Sepulchre* which lies within the said liberties of the city of *London*, shall cease and determine, and be no longer paid or payable.

For conti-
 nuing cer-
 tain com-
 pensations
 out of the
 city cham-
 ber, in lieu
 of houses
 taken
 down, &c.

X. And whereas in several of the aforesaid parishes divers houses and other buildings have been taken down, for the improvement of the city of *London*, by order of the lord mayor, aldermen, and common council of the said city, or have been taken down or altered by other corporate bodies or publick companies or persons for other purposes; and as a compensation in respect thereof, certain yearly sums have been regularly paid by the chamber of the said city, or by such corporate bodies or publick companies, or persons, to the incumbents of the parishes wherein the houses and buildings so taken down were respectively situate, which yearly sums are equal to the yearly sums paid under the before recited act, to the said incumbents, in respect of the said houses and other buildings so taken down; and it may happen that other houses and buildings may be hereafter taken down or altered for similar purposes; be it therefore further enacted, that the several yearly sums of money, which such incumbents respectively have been accustomed, or are or may be entitled to receive from the chamber of *London*, or from any other corporate body or bodies, company or companies, or from any person or persons whomsoever, in respect of the said houses and other buildings so taken down, shall respectively be and continue to be paid and payable to the said incumbents respectively, and their respective successors, in aid and as part of the several sums herein-before authorized to be raised by assessments, for the benefit

of the said incumbents respectively, but so nevertheless as not to exonerate any dwelling-house, shop, warehouse, or other building, in the occupation of any private person or persons, from the payment of the sum or sums for tythes or in lieu of tythes to be assessed by virtue of this act; but that the said sum or sums so to be assessed and paid for or in respect of any such dwelling-house, shop, warehouse, or other building, shall be received and taken by the incumbent of any parish in which the same shall be situate, in part of the sum or sums by this act authorized to be raised for the benefit of such respective incumbent.

XI. And be it further enacted, that if any of the inhabitants in any of the respective parishes aforesaid shall refuse or neglect to pay to the respective incumbents of any of the said respective parishes any sum or sums of money to him or them respectively payable, or appointed to be paid by virtue of this act, or any part thereof, contrary to the true intent and meaning of this act, (being lawfully demanded by the said respective incumbents, or their agents or receivers, or collectors either in person or by writing left at the house or houses, wharf, quay, crane, cellar, or other premises out of which the same is payable) that then it shall be lawful for the lord mayor, or any other magistrate of the city of *London* for the time being, upon oath to be made before him of such refusal or neglect, to give and grant warrants for the officer or person appointed to collect the same, with the assistance of a constable, in the day-time, to levy the same sums of money so due and in arrear and unpaid, by distress and sale of the goods and chattels of the party or parties so refusing or neglecting to pay, or the goods and chattels of the occupier or occupiers for the time being, of the tenements or hereditaments in respect whereof such arrears shall be due or owing, restoring to the owner or owners the overplus of such goods, or the overplus of the monies produced by such sale, over and above the said arrears of the said monies so due and unpaid, and the reasonable charges of making such distress, which he is to deduct out of the monies raised by sale of such goods.

XII. Provided always nevertheless, and it is hereby further enacted and declared, that notwithstanding any thing herein-before contained, in case, and when and so often as all or any of the respective annual maintenances or sums by this act appointed to be raised and paid or so much of them respectively, or of any of them, as shall exceed what the respective impropiators before mentioned are by this act enjoined respectively to allow, shall respectively be assessed and raised, by the ways and means and in the manner herein-after authorized and directed, and paid to the said respective incumbents, or their respective agents or collectors, or receivers, within thirty days next after the several quarterly days herein-

1804.

Directing
how the money shall be recovered in case of refusal of payment.

Proviso that if the sums assessed shall be paid in manner after mentioned, they shall not be raised as before directed.

1804.

before appointed for the payment thereof, without any deduction or abatement whatsoever, then and in every such case from time to time, such of the same respective annual maintenances or sums, or such part or parts thereof respectively as shall be so paid, shall not be raised or paid as herein-before is directed, but by the ways and means and in the manner herein-after authorized and appointed in that behalf.

Power for
churchwardens,
&c. to
make yearly
assessments.

XIII. And be it further enacted, that it shall be lawful for the churchwardens or churchwarden (if but one) of the respective parishes wherein the maintenances aforesaid, are respectively to be assessed, and to and for any one or more of the parishioners, to be yearly appointed in vestry by the inhabitants of such respective parishes (the first of such vestries in each parish to be summoned by the said respective churchwardens or churchwarden, and held within twenty-one days next after the passing of this act) to assemble and meet together yearly and every year at some convenient and seasonable time before the thirty-first day of *July* next after such appointment, in some convenient place within every of the respective parishes wherein the maintenances aforesaid are to be assessed; and the said churchwardens or churchwarden, and the parishioner or parishioners to be appointed as aforesaid, or the major part of them so assembled in and for each respective parish, are hereby authorized and empowered yearly before the twenty-first day of *August* in every year, by an equal rate upon all houses, shops, warehouses, cellars, wharfs, quays, cranes, waterhouses (each waterhouse to be paid for in the parish where it stands only) tofts of ground, remaining unbuilt, or other hereditament or hereditaments whatsoever (except parsonage and vicarage houses) within such respective parish, to assess the whole of the respective sum by this act appointed to be paid in lieu of tythes within such respective parish, for or towards such maintenance as aforesaid, or so much of it as shall exceed what the respective impropiators (if any) are herein-before by this act enjoined respectively to allow, together with the charges of making such respective rate or assessment, and collecting the money so assessed, and all other incidental charges relating thereto, the same to be payable and paid quarterly on the several days first herein-before appointed for the payment of the said maintenance; and the said churchwardens or churchwarden, and parishioner or parishioners, to be yearly appointed as aforesaid, or the major part of them so assembled in and for each respective parish, shall and they are hereby further authorized to collect and receive the sums so by them to be assessed, as and when the same shall become due, and with or out of the same or otherwise to pay and discharge the respective maintenance for and in respect whereof the same shall have been

assessed respectively, within thirty days next after each quarterly day of payment first herein-before appointed for the payment of such maintenance, without any deduction or abatement whatsoever, and thereupon also to retain, pay, and discharge all such incidental charges and expences as aforesaid.

1804.

XIV. And be it further enacted, that in case any person or persons shall think himself, herself, or themselves aggrieved by any rate or assessment to be made as last aforesaid, it shall be lawful for him, her, or them respectively, to appeal to the court of mayor and aldermen of the said city, whose decision shall be final and conclusive: provided always, that notice of such appeal shall be left in writing at the office of the town clerk of the said city, and also at the house of the churchwarden or of the vestry clerk of the respective parish for which the assessment complained of shall be made, within ten days next after the sum so rated and assessed shall be demanded, and such appeal shall be made to the next court of mayor and aldermen of the said city, after such notice shall be so left as aforesaid.

Power of
appeal
against the
last men-
tioned as-
sessments.

XV. And be it further enacted, that if the owner or owners, or occupier of any house or other hereditament which shall be rated and assessed by virtue or in pursuance of this act, by the ways and means, and in the manner last hereby authorized and directed, shall refuse or neglect by the space of fourteen days next after his, her, or their respective rate or rates, assessment or assessments shall be due, and shall be demanded by the churchwardens or churchwarden, and parishioner or parishioners to whom the same ought to be paid (such demand being left in writing at the house, shop, warehouse, cellar, wharf, quay, crane, waterhouse, toft, or other hereditaments or premises possessed, rented or occupied by him, her, or them, so rated, and assessed) to pay such rate or rates, assessment or assessments, so demanded as aforesaid, unless notice of appeal shall have been left as last before mentioned; or if any such notice be left, and if such appeal shall not be made accordingly, to the next court of mayor and aldermen as aforesaid, then and in every such case it shall be lawful for such churchwardens or churchwarden, and parishioner or parishioners, every or any of them, having a warrant or warrants under the hand and seal of the lord mayor, or any other magistrate of the said city, (which warrant or warrants the said churchwardens or churchwarden, and parishioner or parishioners, is and are hereby required to apply for, and the lord mayor or any other magistrate of the said city, is hereby authorized and required to grant,) and with the assistance of a constable, or any peace officer of the ward, county, city, or liberty, where the person or persons, party or parties, so refusing or neglecting, shall reside, there to seize and distrain any of

Power for
recovering
the sums
assessed by
the church-
wardens,
&c.

1804.

the goods and chattels of the person or persons, party or parties so refusing or neglecting to pay, or to seize and distrain any of the goods and chattels, of the occupier or occupiers for the time being of the tenements or hereditaments, in respect whereof such arrears shall be due or owing; and if the same shall not be replevied, or such rate or assessment paid within five days next after such distress made, together with the costs and charges thereof, then to appraise and sell so much of the said goods and chattels as shall be sufficient to pay the said rate or assessment, and the costs and charges attending such distress and sale, returning the overplus (if any) to the owner or owners of such goods and chattels, the said costs and charges to be settled and allowed by the said lord mayor, or other magistrate who shall have granted such warrant or warrants respectively: provided always, that no such distress shall by virtue of this act be made out of the limits of the said city and liberties thereof, unless such warrant or warrants respectively shall be first backed or countersigned by some magistrate of the county, city, or liberty where such distress is proposed to be made; which warrant or warrants any magistrate, who shall be applied to for that purpose, shall forthwith, and is hereby authorized and required to back or countersign without fee or reward.

If the monies to be assessed by the last mentioned means shall be unpaid for 30 days after any quarterly day of payment, the same shall be raised in the same manner as the first assessment.

Exempting Quakers from being collectors under this act.

Vesting the powers of the said acts of 22 and 23 C. 2. and the powers of this act, in

XVI. And be it further enacted, that when and so often as any quarterly payment of any annual maintenance or sum by this act authorized to be raised and paid, or so much thereof as shall exceed what any impropiator before mentioned is by this act enjoined respectively to allow, shall happen to be in arrear and unpaid to the said respective incumbent entitled to the same, or his respective agent or collector, or receiver for the space of thirty days next after any of the quarterly days herein-before appointed for the payment thereof, then and in every such case, from time to time, every such quarterly payment so in arrear and unpaid shall and may be raised or levied and paid by the ways and means, and according to the assessment, and in the manner first herein-before authorized and directed in that behalf.

XVII. And be it further enacted, that nothing in this act contained shall be construed to compel or oblige any person or persons, being of the people called *Quakers*, to collect any of the monies to be raised under or by virtue of this act, but such person or persons is and are hereby excused and exempted from collecting the same.

XVIII. And be it further enacted, that all and singular the powers and authorities in and by the said recited act of the twenty-second and twenty-third years of king *Charles* the Second, given to and vested in the lord mayor and court of aldermen of the city of *London*, shall be and the same are hereby from henceforth given to and vested in

the said lord mayor and court of aldermen for the time being, for and in respect of all and singular the matters and things in this act contained, or by this act enacted, so far as the case is or shall be applicable; and that in case the said lord mayor and court of aldermen shall refuse or neglect to execute any of the respective powers to them by this act granted, or to perform all and every such things relating either to the assenting or levying of the respective sums aforesaid, as they are by this act authorized and required to perform, either expressly or by reference, that then it shall be lawful for any two or more of the barons of his majesty's court of exchequer, by warrant or warrants under their hands and seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this act, might or ought to have done, and by such warrant either to empower any person or persons to make the respective assessments as aforesaid, or to authorize the respective officers or persons appointed to collect such assessments, to levy the same by distress and sale of the goods of any person or persons that shall refuse or neglect to pay the same; in manner and form aforesaid.

1804.

the lord
mayor and
court of
aldermen,
&c.

XIX. Provided always, that no court or judge ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due or owing or to be paid by virtue of this act, or any part thereof, other than the persons hereby authorized to have cognizance thereof; nor shall it be lawful for any parson, vicar, curate, or incumbent, to convent or sue any person or persons assessed as aforesaid, and refusing or neglecting to pay the same, in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act for the hearing and determining the same in manner aforesaid.

No court
not having
cognizance
to hold plea
of or for
any monies
payable un-
der this act.

XX. And be it further enacted, that this act shall be deemed, adjudged and taken to be a publick act, and shall be judicially taken notice of as such, by all judges, justices, and other persons whomsoever, without specially pleading the same.

Publick act.

Stat. 53 Geo. 3. c.127. (12 July, 1813.)

An Act for the better Regulation of Ecclesiastical Courts in *England*, and for the *more easy Recovery of Church Rates and Tithes*.

IV. AND whereas, in the seventh and eighth years of king *William* the third, an act was made and passed, intituled, "An act for the more easy recovery of small tithes, whereby, amongst other things therein enacted, two or more of his majesty's justices of the peace are authorized and required to hear and determine complaints touching tithes, oblations, and compositions subtracted

7 & 8 W. 3.
c. 6. § 1.

1813.

Justices of
peace may
determine
complaints
respecting
tithes not
exceeding
10 pounds.

“ or withheld, not exceeding forty shillings: and whereas it has become expedient to enlarge such amount, and also to extend the said act to all tithes whatsoever of a certain limited amount;” be it enacted, that such justices of the peace shall from and after the passing of this act be authorised and required to hear and determine all complaints touching tithes, oblations, and compositions substracted or withheld where the same shall not exceed ten pounds in amount from any one person, in all such cases, and by all such means, and subject to all such provisions and remedies, by appeal or otherwise, as contained in the said act of king *William* touching small tithes, oblations, and compositions not exceeding forty shillings: provided always nevertheless, that from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace as in the said act is set forth.

V. And be it further enacted, that from and after the passing of this act, no action shall be brought for the recovery of any penalty for the not setting out tythes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced within six years from the time when such tithes became due.

7 & 8 W. 3.
c. 34. § 4.
and 1 Geo.
1. st. 2.
c. 6. § 2.

VI. And whereas in the seventh and eighth years of king *William* the third an act was made and passed, intituled, “ An act that the solemn affirmation and declaration of the people called Quakers shall be accepted instead of an oath in the usual form, whereby, amongst other things, it is therein enacted, where any Quaker shall refuse to pay for, or compound for his great or small tithes, or to pay any church rates, two or more of his majesty’s justices of the peace are authorized to hear and determine the same, not exceeding the value of ten pounds: and whereas by a statute made and passed in the first year of king *George* the first, the said act is extended to other objects: and whereas it has become expedient to enlarge the said sum,” be it enacted, that from and after the passing of this act, all the provisions of the said act of king *William* and king *George*, shall be deemed and taken to extend to any value not exceeding fifty pounds; provided always nevertheless, that from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set forth.

As to Qua-
kers ne-
glecting to
pay tithes,
&c. ex-
tended.

Stat. 1 Geo. IV. c. 59. (Local and Personal Act.)

An Act for uniting the Rectory and Vicarage of the Parish of *St. Dunstan in the West*, in the City of *London*, and the Suburbs of the City, and for securing a certain annual Payment to the Rector of the said Parish, in lieu of Tithes.

THIS statute, after reciting that *Henry Hoare* and others were seized of the inappropriate rectory of *St. Dunstan*, and that the reverend *Richard Lloyd* was the vicar thereof, and that certain disputes had arisen touching the respective rights of the rectors inappropriate, and of the vicar, to the tithes, or customary payments in lieu of tithes; and that it had been agreed, with the concurrence of the bishop of *London*, that the rectory and vicarage of the said parish should be united; that the vicar should be rector, and that a certain annual allowance should be made to the rector in lieu of such tithes, or customary payments, enacted that the rectory and vicarage should be united and become one rectory; that the vicar should be rector without any new admission or institution; that all the right and title of the said *Henry Hoare*, &c. to the rectory of the said parish should be vested in the persons who should be entitled to the right of patronage of the vicarage; and that the said *Richard Lloyd*, and his successors, should be acknowledged as rectors. That, in lieu of tithes and compositions, or customary payments within the said parish, and of all payments, except surplice fees and *Easter* offerings, and except such legacies or annuities as have been or may be given by any person for lectures or sermons, there should be paid to the said *Richard Lloyd*, and his successors, the yearly sum of 358*l.* 14*s.* 4*d.* payable quarterly; that the said sum should be raised by the several yearly payments specified in the schedule of the act, to be payable from the several houses, or sites of houses, in the parish specified therein; and that every such sum respectively should be charged on every such house, and on the ground whereon every such house was then standing; and on all such sites of houses or vacant ground, on which any house before stood liable to tithes, or any customary payment in lieu of tithes, and on all ground, and on every yard, garden, or toft attached to any house in the said schedule specified, or any way appurtenant thereto; and every sum respectively is thereby charged accordingly on every such house as a real charge upon the same. The statute also enacted that the act of 37 *Hen.* 8. "for tithes in *London*" should not be in force in the parish of *St. Dunstan*; and it points out a mode for recovering the sums assessed by distress, and gives a power of appeal to any person thinking himself aggrieved, to the justices at the general or quarter sessions.*

(a) The schedule of this act affords a specimen of the mode of assessing the money payments on the respective houses,

A CATALOGUE

A CATALOGUE of MONASTERIES of the yearly Value of 200*l.* or upwards, dissolved by the Statute of 31 H. 8., and by that Means capable of being discharged of Tithes. In which are the following Abbreviations : A. Abbey ; P. Priory ; C. Aust. Canons of St. Austin ; Bl. M. Black Monks ; Wh. C. White Canons ; Ben. Benedictines ; Gilb. Gilbertines ; Præm. Præmonstratenses ; Carth. Carthusians ; Mon. Monks ; Clun. Cluniacks ; Cist. Cisterrians ; N. Nuns ; T. in the Time of ; ab. about the Year. The Catalogue is extracted from Tanner's *Notitia Monastica*.*

BEDFORDSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£	s.	d.
Elstow olim Helenestow, Elnstowe, or Alnes- towe A. - -	} Ben.	T. W. Conqr.	284	12	11½
Dunstable P. -					
Wardon A. -					
Chicksand P. -	- C. Aust.	T. H. I.	344	13	3½
Newenham P. -	- Cist.	1135.	389	16	6½
Woburn A. -	- Gilb.	ab. 1150	212	3	5½
	- C. Aust.	T. H. I.	293	5	11
	- Cist.	1145	391	18	7½

BERKS.

Abingdon A. -	- Ben.	ab. 670	1876	10	9
Bulthesham, or Bysham- Montague A. - -	} C. Aust.	13 E. III.	285	11	0½
Reading A. -					
	- Ben.	T. H. I.	1938	14	3½

BUCKS.

[88] Missenden A. -	- C. Aust.	1133.	261	14	6½
Noctele, Nuttley, or De Parco Crendon, or De Parco super Thamam A. }	} C. Aust.	1162	437	6	8½
Asheridge, or Ashrug Coll. (a)					
	C. Aust.	T. E. I.	416	16	4

CAMBRIDGESHIRE.

Ely P. (b) -	- Ben.	ab. 970	1084	6	9½
Thorney, olim Ancorig A. -	- Ben.	972	411	12	11
Barnwell P. -	- C. Aust.	1092	256	11	10½

* I refer to that work in its highly improved state, as edited by the very learned and pious Dr. James Nasmith, whose virtues and talents have lately recommended him to the unsolicited patronage of his diocesan, the honourable Dr. James Yorke, the present bishop of Ely, and procured him from his lordship the valuable rectory of Leverington. This is not the only instance of that

amiable prelate's purity and disinterestedness of motive in the distribution of his preferment.

(a) This and Edindon in Wiltshire were houses of regulars within the meaning of 31 H. 8. c. 13. though generally called colleges.

(b) Omitted in the catalogues of sir Simon Degge, Dr. Watson, bishop Gibson, and Dr. Burn.

OF MONASTERIES.

89

CHESHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
St. Werberg's A. -	- Ben.	1093	1003	5	11
Combermere A. -	- Cist.	1133	225	9	7
Vale Royal, or De Valle } Regali A. (c) - - }	Cist.	ab. 1266.	518	19	8

CORNWALL.

Bodmin, olim Bosmanna } P. (d) - - }	C. Aust.	ab. 926	270	0	11
St. German's P. -	- C. Aust.	T. Ethelstan	227	4	8
Launceston, olim Lansta- veton, i. e. Fanum S. } Stephani P. - - }	C. Aust.	ab. 1126	354	0	11½

CUMBERLAND.

Carloli P. -	- C. Aust.	T. W. Rufus	418	3	4½
Holm Cultrum A. -	- Cist.	1150	477	19	3½

DERBYSHIRE.

Little Derby, Derlega, or } Darley A. - - }	C. Aust.	T. H. I.	258	14	5 [89]
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DEVONSHIRE.

Tavystoke, or Tavestock A.	Ben.	981	902	5	7½
Plympton P. -	- C. Aust.	1121	912	12	8½
Hertland A. (e) -	- C. Aust.	T. H. II.	306	3	2½
Ford A. (f) -	- Cist.	1141	373	10	6½
Buckfastre, or Buckfast- leigh A. - - }	Cist.	1137	468	11	2½
Torr A. -	- Præm.	1196	396	0	11
Dunkeswell A. -	- Cist.	1201	294	18	6
Newenham, or Newham A.	Cist.	1246	227	7	8
Bockland Monachorum, or } Buckland A. (g) - - }	Cist.	1278	241	17	9½

(c) *Dugdale* having by mistaking the figure all civil matters ever belonged to Devonshire, made the valuation of this house 118*l.* only, instead of 518*l.*, it had not till now a place amongst the greater monasteries.

(d) i. e. Mansio monachorum. *Leland. Collect. vol. i. 75.*

(e) The parish church of Hertland is commonly called Stoke, and the abbey itself is thence sometimes stiled the abbey of Stoke.

(f) Said to be in Dorsetshire, *Mon. Angl. tom. i. p. 785.* It is indeed in the farthest limit between Dorsetshire and Somersetshire; but in

all civil matters ever belonged to Devonshire, and in ecclesiastical was subject to the bishop of Exeter.

(g) In Devonshire, the name of Buckland Abbey, and the valuation of Plympton, are omitted in *Dege, Watson, and Gibson's catalogues.* Plympton is put down, but instead of its own valuation hath that of Buckland put to it. Exeter St. James, a Cluniac priory, is put in, which was seized as alien, and given away by king Henry VI.

A CATALOGUE

DORSETSHIRE.

	Monasteries.	Order.	Founded.	Value.		
				£.	s.	d.
	Shireburn A. -	-	ab. 870	682	14	7½
	Shaftesbury, <i>olim Sceptonia</i> A. Ben. N.	ab. 888	1166	8	9	
	Middleton, or Milton A. (h) Ben.	ab. 933	579	13	11½	
	Cern, or Cernell A. - Ben.	T. Edgar	515	17	10½	
[90]	Tarent, (i) or Tarrant	Cist. N.	1230	214	7	9
	Kaines, Kaineston, or					
	Kingston, <i>olim Locus</i>					
	Benedictus Reginæ super					
	Tarent, or Locus					
	Reginæ super Tarent,	Ben.	ab. 1016.	390	19	2½
	A. -					
	Abbotisbury, <i>olim Abbo-</i>					
	desbirig A. -					

DURHAM. (k)

Durham P.	-	- Ben.	ab. 842	1366	10	9(l)
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ESSEX.

Berking, <i>olim Berechinga</i> ,	}	Ben. N.	675	862	12	5½
or Bedenham A. -						
Waltham A. -	-	C. Aust.	1062	900	4	3
Colchester A. -	-	Ben.	1096	523	16	0½
Chich A. -	-	C. Aust.	ab. 1118	677	1	2
Stratford A. -	-	Cist.	1134	511	16	3½
Walden A. -	-	Ben.	1136	1946	5	9
Coggeshale, or Coxhall	}	Cist.	1142	251	2	0
A. (m) -						

GLOUCESTERSHIRE. (n)

Gloucester St. Peter's A. -	Ben.	ab. 680	1946	5	9	
Theokesbury, or Tewkes-	}	Ben.	715	1598	1	3
bury A. -						
Winchelcombe A. -	-	Ben.	798	759	11	9½
[91] Cirencester A. -	-	C. Aust.	1117	1051	7	1½
Lantony near Gloucester,	}	C. Aust.	1136	648	19	11½
or Lantonia Secunda -						
Hayles, or Tray A. -	-	Cist.	1246	357	7	8½

(h) This abbey is reckoned by Mr. Speed among his Wiltshire monasteries; and it is also falsely placed in that county by Crassy. Church Hist. lib. xxxi. c. 10. So likewise in Anglia Sacra, vol. i. p. 159. "vii. kal. Apr. 1287. "Monasterium de Middleton in Wilteshire "ignis consumpsit."

(i) Not in Wiltshire, as Matth. Westm. lib. ii. p. 145. and Leland. Collect. i. 455.

(k) For Tinnmouth, generally placed here, see NORTHUMBERLAND.

(l) This is Dugdale's valuation: in Lib. Reg.

Durham priory, with Finchale, Yarrow, Weermouth, Insula Sacra, Farn-Island, Lethom, Stamford, and Durham college, are rated in one sum at 1804. 10s. 3d. ob.; the amount of the several valuations in Dugdale is only 1689l. 15s. 11d. ob.

(m) Omitted in Degge, Watson, Gibson, and Burn.

(n) Bristol, St. Austin's, and Kingswood, are often placed in this county. See the former at the end of SOMERSETSHIRE, and the latter in WILTSHIRE.

OF MONASTERIES.

91

HAMPSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Winchester St. Swithin's P.	Ben.	ab. 646.	1517	7	2½
Hyde, or Newminster A.	- Ben.	901	865	18	0½
Rumesey A.	- Ben. N.	967	393	10	10½
Wherwell A.	- Ben. N.	986	339	7	7
Twinham, or Christchurch P.	C. Aust.	ab. 1150	312	7	0½
Southwyke, or Portchester } P. - - - }	C. Aust.	1133	257	4	4½
Beaulieu A.	- Cist.	1204	326	13	2½
Tychfield A.	- Præm.	1231	249	16	3

HEREFORDSHIRE.

Wigmore A. (o)	- C. Aust.	T. H. I.	267	2	10½
Leominster, or Lemster, olim Leonis Monaste- rium, Leof, or Llanli- ensis, Cell. (p)	- Ben.	bef. 1125	212	12	0

HERTFORDSHIRE.

St. Alban's A.	- Ben.	793	2102	7	1½
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HUNTINGDONSHIRE.

St. Neot's, olim Eynulfes- bury, or Henulvesberi P.	- Ben.	T. H. I.	241	11	4½
Ramsey A.	- Ben.	969	1715	12	3

KENT.

Canterbury (q) Christ- church P.	- Ben.	ab. 600	2349	8	5½ [92]
Canterbury St. Augus- tine's A.	- Ben.	ab. 605	1413	4	11½
Leedes P.	- C. Aust.	1119	362	7	7
Boxley A.	- Cist.	1146	204	4	11
Feversham A.	- Ben.	1147	286	12	6½
Dertford P.	- Aust. N.	ab. 1355	380	9	0½
Rochester P.	- Ben.	ab. 600	486	11	5
Malling A.	- Ben. N. T. W. Rufus		218	4	2½

(o) Expressly said in the act of surrender to be in this county, Rymer, xiv. 614: But Mr. Speed places it in Shropshire, upon the borders of which it is, and in the archdeaconry of Salop. It is thought to be in the parish of Leintwardin, N. This abbey is most certainly in Herefordshire, and in the parish of Wigmore, (not of Leintwardine), in the deanery of Leominster, and archdeaconry of Hereford. G.

(p) This was a cell only to Reading, to which it paid yearly 448*l.* 4*s.* 8*d.*; and hath no valuation in *Dugdale*, *Speed*, or the *Liber Regis*. It appears however from bishop *Fox's* register, that the gross amount of its revenues was 660*l.* 16*s.* 8*d.* and the reprises only 448*l.* 4*s.* 8*d.*

(q) Omitted in *Dege*, *Watson*, *Gibson*, and *Burn*.

A CATALOGUE

LANCASHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Furnes A. (r)	- Cist.	1124	805	16	5
Whalley A.	- Cist.	1172	321	9	1½

LEICESTERSHIRE.

Leicester St. Mary A.	- C. Aust.	1143	951	14	5½
Landa, Launde, or Lo-	} C. Aust.	T. H. I.	399	3	3½
dinton P.					
Croxton, or De Valle in	} Præm.	1162	385	0	10½
Croxton A.					

LINCOLNSHIRE.

Bardney, olim Beardanam A.	Ben.	T. Etheldred	366	6	1
Crowland A.	- Ben.	716	1083	15	10½
Spalding A.	- Ben.	1052	767	7	11
Sempringham P.	- Gilb.	ab. 1139	317	4	1
Kirksted A.	- Cist.	1139	286	2	7½
Thorneton upon the Hum-	} C. Aust.	1139	594	17	5½
ber, or Thornton Cur-					
teis, olim Torington A.	} Cist.	1142	287	2	4½
Revesby A.					
Lincoln St. Catherine P.	- Gilb.	1148	202	5	0½
Barlings, (s) or Oxeney A.	Præm.	1154	252	5	11½
[93] The Priory in the Wood,	} Carth.	ab. 19 R. II.	237	15	2½
or the House of the					
Visitation of the Blessed					
Virgin, near Eppworth,					
in the Isle of Axholm					

LONDON and MIDDLESEX.

St. John of Jerusalem, or	} —	1100	2385	19	11
St. Jones					
St. Bartholomew's P. (t)	- C. Aust.	1123	693	0	10½
Clerkenwell, or St. Mary	} Ben. N.	ab. 1100	262	19	0
de Fonte Clericorum P.					
Haliwell P.	- Ben. N.	before 1127	300	19	5
St. Helen's P.	- Ben. N.	ab. 1210	320	15	8½
Chartreuse House P. (u)	- —	ab. 1360	642	0	4½
The Minories (u)	- —	1293	318	8	5

(r) This is often placed in Yorkshire or Richmondshire.

(s) Omitted in *Degge, Watson, Gibson, and Burn*.

(t) The valuations in the Lib. Regis of the different houses in London vary so much from those in *Dugdale* and *Stevens*, that they appear to have been taken from different surveys.

(u) These two are twice put down in *Degge, Watson, Gibson, and Burn*. The first by the

names of "London, a house of Carthusians founded in the time of K. Edward 3," with *Dugdale's* valuation; and "St. Mary Charterhouse, Carthusians founded in the year 1379," with *Speed's* valuation. The latter, by the names of "London Minors. Benedictines, founded in the time of K. Edward 1," with *Dugdale's* valuation; and "St. Clare without Aldgate, Moniales, founded in the year 1292," with *Speed's* valuation.

OF MONASTERIES.

93

LONDON and MIDDLESEX — *continued.*

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Eastminster New Abbey, or St. Mary of Graces, } (x) - - - - - }	Cist.	1349-50	547	0	6½
Westminster, olim Thor- neie A. - - - - - }	Ben.	ab. 610	3470	0	2½
Syon A. - - - - -	Brig N.	1414	1731	8	9½

NORFOLK.

St. Bennet's of Hulme A. -	Ben.	ab. 1800	583	17	0½
Walsingham P. - - -	C. Aust.	T.W.Conq.(x)	391	11	7½
Thetford P. - - -	Clun.	ab. 1104	312	4	4
Castleacre, or Estacre P. -	Clun.	ab. 1085	306	11	4½
Norwich P. (y) - - -	Ben.	1100	874	14	6½
Westacre, olim Acra P. -	C. Aust.	T. W. Rufus	260	13	7½
Wymondham, or Wind- ham A. - - - - - }	Ben.	before 1107	211	16	6½
West Dereham A. - - -	Præm.	1188	228	0	0½

[94]

NORTHAMPTONSHIRE.

Peterborough, olim Me- deshamsted A. - - - }	Ben.	ab. 655	1721	14	0½
Northampton St. Andrew's -	Clun.	1076	263	7	1½
Pipewell, olim S. Mariæ de Divisis - - - }	Cist.	1143	286	11	8½
Sulby, or Welleford A. -	Præm.	ab. 1155 (z)	285	8	5

NORTHUMBERLAND.

Tinmouth (a), olim Dune- muth, or Dounemade }	Ben.	T. St. Oswald	397	10	5½
Cell. - - - - - }					

NOTTINGHAMSHIRE.

Wirkesop, or Radford (b) }	C. Aust.	T. H. I.	239	15	5
P. - - - - - }					
Lenton P. - - -	Clun.	T. H. I.	387	10	10½
Thurgarton P. - -	C. Aust.	ab. 1130	359	9	4½
Welbeck A. - - -	Præm.	1152	249	6	3

(x) This abbey, S. Mariæ de Gratiis, was different from the abbey de Gratiis B. Mariæ, though they were both "extra muros civitatis London," and near the Tower.

(z) This is *Dugdale's* valuation, besides which the offerings at our Lady's shrine were valued at 200*l.* 12*s.* 4*d.* ob. which two sums together make 662*l.* 3*s.* 11*d.* ob. q. the valuation in *Liber Regis*.

(y) Omitted in *Degge, Watson, Gibson, and Burn.*

(z) 258*l.* 8*s.* 5*d.* *Dugdale* and *Stevens*.

(a) Put in twice in *Degge, Watson, Gibson, and Burn.* In *Durham* with *Dugdale's* valuation, and here with *Speed's*.

(b) Called generally *Worksep Priory*, but it was situated at Radford near *Worksep*.

A CATALOGUE

OXFORDSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Egnesham, or Eynsham A.	Ben.	before 1005	441	12	2½
Tame A. -	- Cist.	ab. 1137	256	14	7½
Godestow A. -	- Ben. N.	1138	258	10	6½
Oseney A. -	- C. Aust.	1129	654	10	2½
Dorchester (c), olim Dor-	- } C. Aust.	1140	217	5	9½
cia A. -					

SHROPSHIRE.

Wenlock, olim Wimnias	} Clun.	14 W. Conq.	401	7	0½
A. (d) -					
Shrewsbury A. -	- Ben.	1083	532	4	10
Hagmon A. -	- C. Aust.	1110	259	13	7½
Lilleshall, near Duninton, A.	C. Aust.	ab. 1145	229	3	1½
Hales, or Halesoweyne A. (e)	Præm.	T. John	280	13	2½

SOMERSETSHIRE.

Glastonbury, olim Avallo-	} Ben.	—	(f) 3311	7	4½
nia A. -					
Bath A. -	- Ben.	ab. 775	617	2	3
[96] Athelney, olim Ethelin-	} Ben.	ab. 888	209	0	3½
graia A. (g) -					
Michelnay, or Muchenay	} Ben.	939	447	4	11½
A. (h) -					
Bruton, Brewetone, or Bri-	} C. Aust.	ab. 1005	439	6	8
wedon A. -					
Montacute P. -	- Clun.	{ T. W. Co. }	456	14	3½
		{ or H. I. }			

(c) Dr. *Nasmith* has omitted this house in his collection; the clear sum, according to *Stevens* and Dr. *Tanner's* MSS. valuation, being only 190*l.* 2*s.* 6*d.* q. However, if we may depend on the accuracy of the *Liber Regis*, this was one of the greater monasteries. Besides these five houses, *Degge, Watson, Gibson, and Burn*, have St. Frideswide's, Oxon, which was dissolved A. D. 1524.

(d) Capgrave in vita S. Milburgæ, and Leland. Collect. vol. ii. p. 170. In aftertimes the legal style of this monastery was Wenlock Magna, or Moche Wenlock, as Plowd. 187, 188.

(e) Placed also in Worcestershire by Mr. *Speed*: and valued by *Dugdale* and *Speed*, and in almost all the catalogues of the greater abbeys, under both counties; and indeed it is in a part of Shropshire which is encompassed with Worcester-shire.

(f) After the attainder of the last abbot, a new survey was made of the possessions of this abbey, (printed by Mr. *Hearn* at the end of *Langtoft's Chronicle*, p. 343.) in which they are valued at the clear yearly sum of 4084*l.* 6*s.* 8*d.* q. Nor does this latter survey seem to have been correct and full; for among the Harleian MSS. No. 142:

in the British Museum, there is a book with this title, "An abstract or brief noat taken out of Mr. Nicholas Raie's Courte-Bookes and Courte-Rolles, the last of November, in the 24 yere of the raigne of our sovereigne ladye the quene's majesty that now is, of all such mannors, lordshippes, landes, tenements, parsonages, quitrents, pencyons, and suche others as was lefte out of auditor Peps booke of survey, at suche time, and when as he made and toke the survey of the late dissolved abbey and monastery of Glaston, and as are to be had and come by for this shorte tyme of warning. Anno Domini 1581."

i. e. "An account of lands belonging to Glastonbury Abbey, and concealed from the crown; which so hapned, because these lands lay in the manors belonging to the lord abbat, but yet were separately held by divers officers of the abbey, who held their own courts upon them, and received the profits accruing from them."

(g) i. e. Clitonum Insula, Jo. Wallingford. Nobilium Insula, Leland. Collect. vol. iii. p. 44.

(h) Erroneously placed in Dorsetshire by the editors of the Monasticon.

OF MONASTERIES.

96

SOMERSETSHIRE — *continued.*

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Taunton P. -	- C. Aust.	T. H. I.	286	8	10
Keynsham A. -	- C. Aust.	ab. 1170	419	10	4½
Minchin Buckland P.	- Aust. N.	T. H. II.	223	7	4½
Witham P. -	- Carth.	T. H. II.	215	15	0
Henton P. Atrium Dei, or Locus Dei (i) -	} Carth.	1227	248	19	2

BRISTOL.

Great St. Augustine's P.	- C. Aust.	1148	670	13	11½
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STAFFORDSHIRE.

Burton A.	- Ben.	1004	267	14	3
Dieulacres A. (k) -	- Cist.	1214	227	5	0

SUFFOLK.

[97]

Bury St. Edmund, olim Bederiesworthe, or Ead- mundestow A. -	} Ben.	1020	1656	7	3
Sibton A. (l) -	- Cist.	1149	250	15	7½
Butley P. (m) -	- C. Aust.	1171	318	17	2½

SURREY.

Chertsey, olim Cirotesege, or Ceortesei A. -	} Ben.	666	659	15	8½
Bermondsey A. -	- Clun.	1082	474	14	4½
St. Mary Overy P.	- C. Aust.	1106	624	6	6
Merton P. -	- C. Aust.	1117	957	19	5½
Aldebury P. -	- C. Aust.	T. R. I.	258	11	11½
Shene P. -	- Carthus.	1414	777	12	0½

SUSSEX.

Battell, or De Bello A.	- Ben.	1067	880	14	7½
Lewes P. -	- Clun.	1078	920	4	6½
Robert's Bridge, or De Ponte Roberti A. (n) -	} Cist.	1176	248	10	6

(i) Henton is not in Wiltshire, as it is erroneously said to be in the Monasticon. And note, Athelney and Montacute are omitted in *Degge*, the greater monasteries.

(k) In *Degge*, *Watson*, *Gibson*, and *Burn*, Croxden, a Cistercian bbey, is added, which had only 90*l.* 5*s.* 11*d.* *per ann.* clear. But the lands of it have been adjudged to be tithe-free, because it was continued by K. Henry 8.

(l) Not in Norfolk, as Mon. Angl. vol. i. p. 886. and vol. iii. p. i. 52. This abbey, and all

the estates belonging to it, were sold by the abbot and convent two years before the act for dissolving the greater monasteries.

(m) Ixworth is added in *Degge*, *Watson*, *Gibson*, and *Burn*, with *Speed*'s mistaken valuation of 280*l.* 9*s.* 5*d.* whereas the whole sum was really no more than 204*l.* 9*s.* 5*d.* and the clear sum only 168*l.* 19*s.* 7*d.* ob. q.

(n) These three in Sussex are omitted in Sir *Simon Degge*'s catalogue.

A CATALOGUE

WARWICKSHIRE.

	Monasteries.	Order.	Founded.	Value.		
				£.	s.	d.
	Coventry P. (o) - -	Ben.	ab. 1043	538	4	0
	Kenilworth, olim Chenin- genurda A. - -	C. Aust.	ab. 1122 (p)	538	19	4
	Mereval, or De Miravalle, near Atherston A. - -					
		Cist.	ab. 1148	254	1	8
[98]	Combe (q), olim Smite, near Brinklow A. - -	Cist.	1150	311	10	1
	Nun Eaton P. (r) - -	Fonterv.	N. T. H. II.	253	14	2½

WILTSHIRE.

	Ambrosebury, or Ames- bury, olim Ambrosia, sive Ambrii Cœnobium A. - -	Ben. N.	ab. 980	495	15	2
	Malmesbury, olim Caer Bladon, Ingelborn, Mai- dulphi urbs, sive Curia, Aldhelmesbirig, Mald- mesburgh, Meldunum, or Meldunesburgh A. - -					
		Ben.	ab. 670	803	17	7½
	Wilton, olim Ellandune A. -	Ben. N.	T. Egbert	601	1	1½
	Kingswood A. (s) - -	Cist.	1139	244	11	2
	Bradenstoke P. - -	C. Aust.	1142	212	19	3
	Edindon, or Hedington } P. (t) - - - }	Bonhom- mes }	1358	442	9	7½

WORCESTERSHIRE.

	Worcester P. (u) - -	Ben.	T. Edgar	1229	12	8½
	Pershore, olim Perscora A. -	Ben.	984	648	4	5
[99]	Eovesham, or Evesham A. -	Ben.	701	1189	12	9
	Malvern Major P. - -	Ben.	ab. 1083	308	1	4½
	Bordesly A. (w) - -	Cist.	1138	388	9	10½

(o) Omitted in *Degge, Watson, Gibson*, and *Burn*.

(p) Summa inde 219l. 12s. Od. ob. q. summa clara 190l. 2s. 6d. q. *Stevens* and *Tanner's* MSS. valor. If we may depend on the accuracy of the *Liber Regis*, this was one of the greater monasteries.

(q) Erroneously placed by Mr. *Speed* in Leicestershire.

(r) It is frequently called an *abbey* in the charters of *Robert Bossu*, earl of Leicester, the founder, his son, and of K. Henry 2. Mon. Angl. tom. i. p. 518, 519.

(s) This abbey was placed in Gloucestershire in the first edition of *Tanner's* *Notitia Monastica*, (as Mon. Ang. tom. i. p. 811. 1040. 1060.);

but the town is, it seems, subject to the sheriff and justices of Wiltshire, and accounted within the hundred of Chippenham in that county, though it be encompassed with Gloucestershire, and seven miles distant from any other town in Wiltshire. With regard to the spiritual jurisdiction, it is in all matters subject to the bishop and archdeacon of Gloucester.

(t) Farleigh and Lacock are added, with *Speed's* valuation, in *Degge, Watson, Gibson*, and *Burn*; whereas in *Dugdale* Farleigh is only 153l. 14s. 2d. ob. and Lacock 168l. 9s. 2d.

(u) Omitted in *Degge, Watson, Gibson*, and *Burn*.

(w) Falsely placed by *Speed* in Buckinghamshire.

OF MONASTERIES.

99

YORKSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Whitby, olim Streanes- chach, Sinus Phari, Prestebý A. -	} Ben.	T. W. Conqr.	437	2	9
Selby, olim Salebeia A. -					
Watton, olim Vetadun P. -	Gilb.	ab. 1150	360	18	10
York St. Mary A. -	Ben.	1088	1650	7	0½
Pontfract, olim Kyrkeby, or Brokenbrigge P. -	} Clun.	T. W. Rufus	327	14	8½
Nostell, Nostlai, or Nestel- hoo P. -					
Bolton in Craven P. -	C. Aust.	T. W. Rufus	492	18	2
Kirkham P. -	C. Aust.	1120	212	3	4
Burlington, or Bridling- ton, olim Brellinton, or Berlintonia P. -	C. Aust.	1121	269	5	9
Giseburne, or Gysburgh P. -	C. Aust.	T. H. I.	547	16	11½
River, olim Rievall, or Ri- vaux A. -	} Cist.	1129	628	3	4
Fountains, or De Fonti- bus A. -					
Byland, olim De Bella- landa, Begelanda, sive Bechland A. -	} Cist.	1131	278	10	2
Newburgh, or De Novo Burgo P. -					
Roch, or De Rupe A. -	Cist.	1132	998	6	8½
Kirkstall A. -	Cist.	1143	238	9	4
Melsa, or Meaux A. -	Cist.	1145	367	13	3
Joreval, Jervaux, or Ger- vis A. -	} Cist.	1147	224	2	5
Monk Breton, or Lunda P. -					
Mountgrace P. (x) -	Carth.	1147	329	2	11
		1150	299	6	4½
		1156	234	18	5
		T. H. II.	239	3	6
		1396	323	2	10½

[100]

It may not be amiss to subjoin to this catalogue of the religious houses, part of the instructions which were drawn up by the king's order, to ascertain the value of all the estates of the clergy, both secular and regular, for the purpose merely, as it was alleged, of securing the full payment of the tenths. But as *Collier* observes,

(x) *Dege*, *Watson*, *Gibson*, and *Burn*, have also *Hull* *Chartreusehouse*, *Warter*, and *Old Malton*; whereas in *Dugdale* the first is valued at 174*l.* 18*s.* 3*d.* the second at 143*l.* 7*s.* 8*d.* and the third at 197*l.* 19*s.* 2*d.* They have also *Rithal* 351*l.* 14*s.* 6*d.* which is the total valuation of *Ri-vaux*, before inserted with *Dugdale*'s valuation. Val *Crucis* in *Denbighshire* is likewise put in with *Speed*'s valuation, though valued in *Dugdale* at 188*l.* 8*s.* only. And *Stratflour* or *Strata Flo-rida*, in *Cardiganshire*, (probably from the figures not being distinctly placed in *Speed*), is made 1296*l.* 6*s.* per ann. in *Dege*, *Watson*, *Gibson*, and *Burn*; whereas the sum total is no more than 122*l.* 6*s.* 8*d.* and the clear sum only 118*l.* 7*s.* 3*d.*

(Ecel. Hist. vol. ii. p. 95.), " these instructions had in all likelihood a farther reach : the design seems to have been to draw envy upon the spirituality from the greatness of the revenues. It was to give the king an inviting prospect upon the abbies, to awaken his fancy towards a dissolution, and solicit him to make prize of the church."

Biblioth.
Cott. Cleop.
E. 4. fol.
167.
These instructions
issued in
January
1534-5.

" Instructions devised by the king's highness, by the advice of his council, for knowledge to be had of the whole, true, and just yearly values of all the possessions, manors, lands, tenements, hereditaments, and profits, as well spiritual as temporal, appertaining to any manner of dignity, monastery, priory, church collegiate, church conventual, parsonage, vicarage, chantry, free chapel, or other dignity, office, or promotion, spiritual within this realm, *Wales, Calais, Berwick*, and marches of the same, as well in places exempt as not exempt, which his pleasure is that such as shall have charge by his commission to survey the same, shall effectually, with all uprightness and dexterity, follow and ensue, as they will answer to his majesty at their peril."

101] The Contents of the Instructions may be understood from the last Article, which was thus :

" *Item*, Finally, after the true and just yearly value of all the dignities, benefices, offices, cures, and other promotions spiritual, afore rehears'd, examin'd, and known, then the said commissioners, to whom the commission shall be directed, shall cause to be made a fair book after the auditor's fashion, putting first in the head thereof the name of the archbishoprick or bishoprick where the commission is directed, if the see be within the limits of their commission; and the whole and entire value thereof like as is afore-mentioned in the article concerning the same; with the deductions to be resolute that are mentioned in the said article, and none other. And then next to put the name of the cathedral church or monastery, where the see of the archbishoprick or bishoprick is, and the number and names of all such dignities, prebends, offices, cures, chantries, and promotions spiritual, which be in succession in the said cathedral church or monastery : and as well the whole and entire yearly value of the said cathedral church or monastery, as the particular yearly profit that belongs to every the said dignities, prebends, offices, &c. with the deductions to be resolute out of the same, as is mentioned in the article above specified concerning the same : and then next after that, to put the number and name of every archdeaconry and deanry rural, within the limits of their commission, and in whose diocese and jurisdiction they be; and their several and particular yearly value and deductions, like as

“ is mentioned in the article concerning the same : and next after
 “ that to put every college, church collegiate, hospital, abbey, mo-
 “ nastery, priory, house religious, parsonage, vicarage, chantery,
 “ free chapel, and all other promotions spiritual, under the title
 “ and name of the Deanry Rural, where such colleges, churches
 “ collegiate, hospitals, abbey, &c. lyen and bin founded ; and their
 “ several and distinct yearly values. And the number and names
 “ of such prebends, dignities, offices, cures, chanteries, free chapels,
 “ &c. and their distinct and several yearly values, as is before
 “ declared in the said articles ; so that always under the title of
 “ every deanry rural, there be contain’d all such dignities, abbeys,
 “ monasteries, &c. wheresoever they lyen and byn in the deanry
 “ where they be founded and edified. And if any of them be
 “ out of the limits of all deanries, then to put ’em by themselves,
 “ rehearsing their names, and the places where they lyen, and in [102]
 “ whose diocess and jurisdiction, with their whole values, &c.
 “ added to every of ’em distinct by themselves : foreseeing always,
 “ that in the making of the yearly values of every manner digni-
 “ ties, monasteries, &c. above-mentioned, there be made a whole
 “ and entire value of every of ’em by themselves, and nothing to
 “ be allow’d or deducted out thereof for reparations, fees, serving
 “ of cures, or any other causes or things whatsoever it be, except
 “ only such annual and perpetual rents, possessions, alms, synods,
 “ proxies, and fees for offices, as be before especially mentioned
 “ in the articles afore-written. And after the said book be made,
 “ then the said commissioners shall certify the same unto the king’s
 “ exchequer, under their seals, according to the tenor of their
 “ commission, as they will answer unto the king’s highness at their
 “ utmost peril ; to the intent that the tenth of the premises may
 “ be tax’d, and set to be levied to the king’s use, according to the
 “ statute made and provided of the grant thereof.”

The Commission relating to the City and Liberties of *London*,
 made out in pursuance of the preceding Instructions.

“ HENRICUS octavus Dei gratiâ *Angliæ et Franciæ* rex, fidei
 “ defensor, dominus *Hiberniæ*, et in terrâ supremum caput *Angli-*
 “ *canæ* ecclesiæ, reverendo in Christo patri episcopo *Londinensi*,
 “ ac dilectis et fidelibus suis *Johanni Champneys* militi, *Thomæ*
 “ *Cromwell* magno secretario suo, *Johanni Alleyn* militi, *Thomæ*
 “ *Bedell* clerico, *Johanni Baker*, *Henrico White*, *Johanni Onley*,
 “ *Thomæ Rushton*, *Gulielmo Bowyer*, *Paulo Withypoll*, *Richardo*
 “ *Gresham*, *Hervey Mildemay*, *Thomæ Burgoyne*, *Thomæ Ro-*
 “ *bertes*, et *Johanni Foote*, auditoribus, salutem : Sciatis quod nos
 “ de fidelitatibus et providis circumspectionibus vestris plenè con-
 “ fidentes ; assignavimus vos quinque quatuor e vobis, ac quinque

Biblioth.
 Cotton.
 Cleop. E. 4.
 108. fol.
 167.
 A. D.
 1534-5.

“ quatuor et tribus vestrum, vel in majori aut minori numero, prout
 “ per discretionem vestram vobis melius visum fuerit, plenam potes-
 “ tatem et auctoritatem ad inquirendum, scrutandum, et exami-
 “ nandum viis, modis quibus scire poteritis infra civitatem *London*
 “ et libertates ejusdem, de omnibus et singulis articulis et in-
 “ structionibus presentibus annexis, faciend. et exequend. cum
 “ effectu, prout in iisdem articulis plenius continetur, et idem in-
 “ jungentes quod circa premissa, effectualiter intendatis, ac ea
 “ faciat et exequamini diligenter, &c. quod veritatem de eisdem
 [102] “ articulis, et de eorum singulis habere poterimus, absque favore,
 “ fraude, dolo, corruptione, inde nobis respondere velitis; et
 “ quicquid in premissis thesaurario, cancellario, camerario, et ba-
 “ ronibus de scaccario nostro; inde et de omnibus circumstantiis
 “ eorundem prout articuli predicti in se exigunt; et festo Sanctæ
 “ Trinitatis proximè futuræ sub sigillis vestris distinctè et apertè
 “ in debitâ formâ inscriptis certificetis: et hoc sub periculo incum-
 “ benti nullatenus omittatis. Damus etiam præterea vobis plenam
 “ potestatem tales et tantos scribas, registrarios, receptores, audi-
 “ tores, et alios officarios et ministros quorumcunque prælatorum
 “ et clericorum ecclesiæ; coram vobis convocandi et examinandi,
 “ prout vobis pro meliori executione videbitur expedire: man-
 “ dantes in super tenore presentium omnibus et singulis vice-
 “ comitibus, majoribus, ballivis, registrariis, ac aliis officiariis et
 “ ministris, tam nostri quam aliorum prælatorum seu clericorum,
 “ singulis fidelibus subditis nostris quibuscunque quod vobis in
 “ executione premissorum de tempore in tempus intendentes sint
 “ et auxiliantes, prout decet. In cujus rei testimonium has literas
 “ nostras fieri fecimus patentes apud *Westm.* xxx die *Januarii*, anno
 “ regni nostri vicesimo sexto.”

C A S E S

RELATING TO

T I T H E S.

Plac. in Octab. S. Mich. An. 9 & 10. H. III. A. D. 1224.

PHILIP de Ardern clerk was attached to answer *John* the son of *Robert*, wherefore he draws him into plea in court christian for the lay-fee of the said *John*, the son of *Robert*, contrary to the prohibition, &c. Whereupon the said *John*, by his attorney, complains, that the said *Philip* draws him into plea concerning the wood of *Lee*, and the moor of *Wicton*, and in like manner for this, that whereas the said *John* and his men take pledges of the said *Philip*, for injuring his corn and meadows, and other wrongs; the said *Philip* draws him into plea for that taking, whereby he is injured, &c. to the value of one hundred marks, and therefore he brings suit, &c.

Prynne's
K. John,
p. 69.

And *Philip* comes and saith, That he ought not to answer the said *John* or his attorney in any plea, because he is excommunicated; and he brings here the letters of the archbishop of *Yorke* thereof, which testify this *in hæc verba*. “*W.* by the grace of God, &c. Know ye, that the abbot of *Kokersand*, and the priors of *Kokersand* and of *Rokeham*, have informed us, that they have, by the authority of the pope, put in the bond of excommunication the noble man *John*, the son of *Robert*; commanding us that we should denounce him such, which we signify to you at the instance of master *Philip*, the bearer of these presents, that you may be certified hereof. Farewell. Given, &c.” And thereupon the said *Philip* saith, that he will not answer, unless the court shall advise it. [106]

And *John* comes by his attorney, and saith, That he doth not complain of the plea before those judges, because, with respect to the tithes of hay and mills which *Philip* there demanded, he will willingly do what of right he ought to do; but *Philip* empleaded him against the prohibition, &c. before *W.* treasurer and *G.* penitentiary of *York*, concerning his lay-fee aforesaid, and moreover

1224. concerning a certain hermitage, and the tenth beast of his forest ; and therefore he hath suit ; and he freely grants to him, &c. the tithes of hay, and mills, and pannage.

And *Philip* defends the whole, except only so far as concerns the tenth beast, which he demands, and whereof his church was seised, and saith, that he and his men have always had their pasture every where in the forest ; and the said *John* and his men take his men, and deprive him of his pasture and common.

Because the said *John* doth not shew at the said day, by citations or any other means, that the said *Philip* prosecuted any plea in court christian, concerning any lay-fee, it is considered that *Philip* go thereof quit, and *John* be in mercy. And it is prohibited to *Philip* to prosecute any plea against the crown of the lord the king.

In a fragment of plea-rolls in the Tower, before the justices itinerant, about the 55th year of *Henry* the 3d, (as *Mr. Prynne* conjectures by the hand,) and A. D. 1274.

Line. Rot.
10.
Prynne's
K. John,
P. 126.

Master *William de Braunsewell* was attached at the suit of *Gilbert Parleben*, wherefore he drew him into plea in the spiritual court about the chattels of the said *Gilbert*, which concern neither testament nor matrimony. And *Henry Dean* of *la Ford* was attached to answer the said *Gilbert*, wherefore he held the said plea.

[107] And *William* and the *Dean* come and say, that after the prohibition of the lord the king, they never held nor prosecuted the said plea ; but they will speak the truth, that in fact the said *Gilbert* sold to the said *William*, and to a certain person his partner, the tithes of the corn of his church for 37 marks ; and because he had not paid that money at the appointed times, he, as parson, em-pleaded him in the chapter before the prohibition : and he demands judgement if he could do that or not ?

And *Gilbert* comes and acknowledges the whole, but saith, that he paid the said money to him, but he hath no suit thereof : and he saith, that the said *William* demands of him a certain penalty.

And *William* saith, that he neither doth nor will demand of him any penalty.

It is therefore considered, that the said *William* may lawfully prosecute the said plea in the spiritual court, since it is concerning tithes, and that the said *Dean* may hold plea thereof. And *Gilbert* in mercy.

Plac. Parl. 18 E. I. No. 84. A.D. 1290.

1290.

RALPH bishop of *Carlisle* demands against the prior of the church of *Carlisle* the tithes of two pieces* of land lately assarted in the forest of *Inglewood*, one of which is called *Lynthwayt*, and the other *Kirkethwayt*, and which belong to the said bishop, for that the said pieces are within the limits of his parish church of *Aspateryk*, and for that the said bishop and his predecessors always before the said pieces were prepared for cultivation, ~~and~~ whilst they were covered with wood, have used to receive the tithes of the pannage of the same pieces, until the said prior by a certain suggestion made upon a suppression of the truth this year sued out a certain writ of the lord the king to the justice of the lord the king of his forest beyond *Trent*, and unjustly deprived the said bishop of the tithes aforesaid: and that the tithes aforesaid belong to the said bishop by reason of his church of *Aspateryk* aforesaid, he prays may be enquired by the country.

Between the bishop and prior of *Carlisle* for the tithes of assarted lands.

See also Riley's Plac. Parl. 49.

Prynne's K. John, p. 409.

* placearum.

And the prior comes and saith, that the tithes aforesaid belong to him and his church of the *Blessed Mary* of *Carlisle*, and not to the said bishop; for he saith, that the lord *Henry*, the old king, granted to God and his church of the *Blessed Mary* of *Carlisle*, and the canons serving God therein, all the tithes of all lands which the said lord the king, or his heirs, kings of *England*, should prepare for cultivation in the aforesaid forest, and enfeoffed the said church thereof by a certain ivory horn, which he gave to the said church, and which it still hath; and he prays judgement, &c.

And hereupon master *Henry de Burton*, parson of the church of *Thoresby*, comes, and saith, that the tithes aforesaid belong to him by reason of his church, and not to the said bishop and prior; because he saith, that the pieces of land aforesaid, of which the tithes are demanded, are within the boundaries of his parish, and that he and his predecessors have always been in the actual perception of the great and small tithes of the aforesaid pieces, as of the right of his church of *Thoresby*, until the said prior, together with certain other persons, by means of the said writ, unjustly deprived him of the said tithes; and that he and his predecessors have always been in the actual perception of the said tithes, as well great as small, he prays may be enquired of by the country, &c.

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And *William Inge*, who sues for the lord the king, saith, that the tithes aforesaid belong to the lord the king and to no one else, because he saith, that the said pieces are within the bounds of the forest of the said lord the king of *Inglewood*, and that the said lord the king may in his said forest build towns, erect churches, assart

1290. lands, and confer such churches with the tithes of those lands upon whomsoever he will at his pleasure, for that the said forest is not within the limits of any parish; and he prays that those tithes may remain to the lord the king, as of right they ought for the reason aforesaid.

And because the lord the king would be certified upon the premises, that to every one may be given that which is his, let *William de Vesey*, justice of his forest beyond *Trent*, *Thomas de Normanvill*, escheator of the said lord the king in those parts, and *Michael de Arkle*, be assigned to enquire the truth of the matter in the premises; and what inquisition they shall make thereupon let them make known to the lord the king in his next parliament after *Easter*; and let the parties aforesaid wait that term. Afterwards, at the said parliament after *Easter*, the said *William de Vesey* and *Thomas de Normanvill*, recorded before the said lord the king and his council, that they could not proceed to take the aforesaid inquisition at the day before given, by reason of a certain letter of the bishop of *Carlisle* delivered to them, inhibiting them from putting any to their oath at that time, which letter, sealed with the seal of the said bishop, the said *William* and *Thomas* produced before the said lord the king: therefore, by the command of the lord the king, let the aforesaid *William*, *Thomas*, *John de Lythegreynes*, and *Michael de Harcla*, be assigned to take the aforesaid inquisition, so that they certify the lord the king thereof at his parliament after the feast of *Saint Michael* next ensuing, &c. and that they adjourn the aforesaid parties to the same day, &c.

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Rot. Parl. 33 E. I. No. 3. A.D. 1304.

Christ
Church.
See also
Ril. Pl.
Parl. 241.

To the petition of the prior and convent of *Christ Church*, praying remedy hereupon, that whereas *Isabella de Fontibus*, late countess of *Albemarle*, granted to them by her deed, the tithe of all conies in the manor of *Thorle*, in the *Isle of Wight*, *William Russell*, the now keeper of the king of the isle aforesaid, does not permit them to take any tithe of this sort:

It is answered, — Let a writ go out of chancery to the treasurer and barons, that they inspect the deed, and make enquiry of the seisin, and further do what shall be just.

Rot. Parl. 8 E. II. No. 97. A.D. 1314 & 1315.

Tenentes
Ville de
Lyskeryde.
(Dorso.)

To our lord the king and his council, shew his tenants of his town of *Liskerede* in *Cornwall*, that whereas king *Richard of Germany*, formerly earl of *Cornwall*, granted to them in fee-farm his town of *Lyskerede* aforesaid, with the mills of the town, rendering therefore yearly 18*l.* 18*d.* and half a mark to the vicar of the said town, and that to be in satisfaction of the tithes of the said mills;

and that the said tenants should not be any more charged 1314-5.
 against their warranty, the said king *Richard* gave 8s. of rent to
 the prior of *Launceston*, parson of the said town of *Liskeard*, at the
 great request of the said prior and vicar, who then covenanted that
 it was the established payment for tithe for ever; from which time
 till now the said farmers have paid the half mark to the vicar, and
 the king's provost of his manor of *Liskeard* has paid the 8s. to the
 parsons of the church; but now lately *John Launseles*, vicar of the
 said town, notwithstanding the composition made between the king
Richard of *Germany* and the vicar's predecessors above named, came
 and demanded of them the tithes in kind, whereas by the aforesaid
 composition he ought to have only the demy mark, and the prior,
 the parson, the 8s. to the disherison of the king, and to the
 charge of the town aforesaid; and upon this the bishop of *Exeter*
 has excommunicated them, and interdicted their church, and con-
 demned them, whereas they can neither charge nor discharge
 themselves, nor prove the said composition, nor put it in judge-
 ment without the king and his council; wherefore they pray
 remedy.

Answer. — Let *Hugh de Curtency*, *John de Foxle*, and *John de* [110]
Westle, or two of them, so that the said *Hugh* be one, be assigned
 to enquire in the presence of the parties of the tithe within written,
 to wit, how much tithe hath used to be given for the mills, &c.
 at the time when it was in the hand of King *Richard* of *Germany*,
 and whether there be a composition thereof or not, and of the other
 articles, &c. and let them return the inquisition before the treasurer
 and barons of the exchequer, and let there be done thereupon
 there what justice shall advise; and let there be a writ to the bishop,
 commanding him, in the mean time, to supersede the execution to
 be done against the men of *Liskeard*, of those things which were
 drawn in plea before him concerning the said tithe, and in the
 mean time to revoke also the sentence, if any should have been
 denounced against them in that case.

Rot. Parl. No. 131. *Eodem Anno.*

To the petition of the prior of the church of Christ of *Twynham*,
 suggesting, that whereas he had empleaded the prior of *Brunmore*,
 in court christian, for certain tithes arising in the lands of the said
 prior of *Brunmore*, in the parish of the church of the said prior of the
 church of Christ of *Bolse*, yet by a certain prohibition of the king,
 directed to the judges, forbidding them to proceed in the said plea,
 for that the said prior of *Brunmore* held all his demesne lands in
 the new forest of the gift of king *Henry*, the king's grandfather,
 the said judges have not proceeded any farther in the plea, &c.
 wherefore they pray remedy :

1314-5. It is answered, let *John de Foxle* and *John de Westcote* be assigned to enquire, in the presence of the parties, who are previously to be summoned, if they choose to be present, whether the said place of which the tithes are demanded be included in the king's charter made to the prior of *Brunmore*, and were of the demesne lands of the said prior at the time of making the said charter, or whether the said prior acquired that place afterwards, and if so, then of whom, and when; and if the said place be within the limits of the parish church of *Bolse*, and were tithable before it came to the hands of the said prior, or not; and if so, then in what manner, and how; and let them return the inquisition into chancery.

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Rot. Parl. No. 134. *Eodem Anno.*

To the petition of *Thomas de Yurflet*, parson of the church of *St. John of Devises*, suggesting that he and all his predecessors have used to have the tithe of hay in the meadow of the park of *Devises*, which meadow is now converted into pasture, and sold to divers men of the country for the feeding of their beasts; and which tithe is now of late subtracted; wherefore he prays remedy:

Answer.

It is answered, let *John de Foxle*, master *John Waleweyn*, and *William de Harden*, or two of them, be assigned to enquire whether the king, at the time when the park was in his hand, used to give the tithe of hay of the meadows in the said park, and from what time, and in what sort, and how; and if those meadows be changed into pasture, then when, and by whom, and in what sort, &c. and how much the tithe thereof coming is worth, &c. and let the inquisition be made in the presence of the parson, if, being warned, he choose to be present, and let the inquisition be returned before the king.

Rot. Parl. No. 221. *Eodem Anno.*

To the petition of — abbess and the convent of *Godestowe*, suggesting to the king, that they are of the foundation of the king's ancestors, and that at the foundation of their house the tithes of all things renewing in the manor and park of *Woodstock* were granted by the charters of the king's progenitors; by virtue of which grant the said abbess and convent, and their predecessors, have always hitherto been seised of the tithes following, to wit, of the tithes of all colts of the king's stud; and that the now keeper of the said stud refuses to pay such tithes, paying only one of the weaker colts to the said abbess and convent yearly; and fourteen colts of the two years last past, for which they have received nothing, remain to be accounted for; wherefore they pray a fit remedy:

It is answered by the council. It seems to the council, that if such sort of tithe be due, and the religious be in the actual perception of it, it must be commanded to the king's bailiff that he pay the tithes due annually; and also pay the arrears thereof, if any there be.

Answer.

Rot. Parl. 15 & 16 E. II. No. 10. A.D. 1321 & 1322.

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To our lord the king and his council, his poor chaplains, the prior and convent of *Brecknock*, pray remedy, for that whereas the keepers of the lands and castles of *Brecknock*, *Hay*, *Glenleveny*, *Talgarth*, thereto appointed by our lord the king, detain from them certain tithes, of which they have been seised from the time of the foundation of their house until now, under divers deeds of the lords of those lands and castles, that is to say, of the tithes * of all manner of things consumed by the lords of the same lauds and castles, or by their servants, whether the lord be present or absent, and the tithe of pleas, tolls, gifts, gains, rents, and of all manner of profits; by which detention your said chaplains are in great mischief of their livelihood: wherefore may it please you, for God's sake, to command your said keepers that they may have and receive the aforesaid tithes for their sustenance, as they hitherto have done, according to the purport of their charters; for if they are not supplied with the aforesaid tithes for their sustenance, they cannot remain there to do for the service of God, as they are bound.

Prior and convent of Brecknock.

* Des tous manieres despenses faitz par les seigneurs, &c. — See similar grants of the tithes of all sorts of victuals, wine, liquors, fish, fowls, butter, cheese, &c. spent in castles or houses, in Prynn's K. John, p. 104.

Answer. — Be it commanded to the keepers of these parts, that they suffer the prior and convent to have and receive the tithes, &c. as they have always before this time had and received them; as they can by inquisition, or any other manner, reasonably know what they have had and received.

Pat. 1. E. III. P. 1. M. 5. A. D. 1327. *Rym. Fadera*, Vol. IV. 277.

Of not observing a Prohibition.

THE king to all to whom, &c. health. The venerable father, *Gaucelin*, cardinal priest of the title of Saint *Mar'* and Saint *Peter* hath prayed us by his petition exhibited before us and our council, that whereas divers persons in our realm are bound to him in divers sums of money for the tithes and fruits of his benefices in *England* purchased by them, and maliciously refuse to satisfy him or his proctors for the same; and the said persons, though they had voluntarily submitted themselves to the coercion of the ecclesiastical jurisdiction, and had consented that they might be compelled by ecclesiastical censures to the payment of those sums, if they should fail therein at the appointed periods; nevertheless bring the king's

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1327. prohibitions to the ecclesiastical judges, by reason of which the said judges dare not to compel them to make such payments, so that the said cardinal is defrauded of his debts; we would be graciously pleased to provide for his indemnity in this behalf: we, having consideration to the laudable obeisance which the said cardinal paid to the lord *Edward*, late king of *England*, our father, and which he continues to pay daily to us and to our whole realm, and willing, of our special grace, to provide for his indemnity in this behalf, will and grant that the said cardinal and his aforesaid proctors may demand and sue in the ecclesiastical court for all debts which are owing to the said cardinal for the tithes and fruits of his benefices in *England*, and that the ecclesiastical judges may compel the said debtors by any censures of the church to make payment of the said debts, any prohibition from us notwithstanding.

In witness whereof, &c. to endure for two years.

Witness the king at *Westminster*, the twenty-sixth day of *March*.

By the king and council.

Pat. 2 E. III. P. 2. M. 34. A. D. 1328. *Rym. Fædera*,
Vol. IV. 356.

The Revocation of the above Suspension of a Prohibition as made against the Common Law.

[114] THE king to all to whom, &c. health. Although we have granted by our letters patent to the venerable father, *Gaucelin*, cardinal priest of the title of *St. Mar'* and *St. Peter*, that he and his proctors may demand and sue in the ecclesiastical court for all debts which were owing to the said cardinal for the tithes and fruits of his benefices in *England*; and that the ecclesiastical judges may compel the said debtors by any ecclesiastical censures to make payment of the said debts, any prohibition from us notwithstanding; yet because, at the prosecution of *Robert de Lasey*, suggesting, by his petition, in our parliament lately convened at *Northampton*, that he hath been impleaded in court christian by the proctors of the said cardinal for such kinds of fruits sold to the said *Robert*, and that he, by reason of our said letters patent, could not have any aid in our court against the said proctors, according to the law and custom of our realm; it seemed to the great men and nobility of the said realm there present, that the said grant was made against the common law of the same realm; we will, that if the said *Robert* be hereafter empleaded in court christian by the said cardinal, or his proctors, under pretence of the said grant, for such sort of debts as aforesaid, that the said *Robert* may henceforth

have prohibitions and attachments thereupon in our chancery if he please, our aforesaid grant notwithstanding. 1328.

In witness whereof, &c.

Witness the king, at *Evesham*, the twenty-eighth day of June.

By petition of the council.

Pet. Parl. 2 E. III. No. 3. A. D. 1328.

To our lord the king, and his council, prays his chaplain, the bishop of *Landaff*, that whereas he holds the church of *Newland* in the forest of *Deane* to his own use, and we have a mine of iron within the parish whereof we make profit, and whereof your father, sire, whom God have mercy upon, commanded by his writ that tithe shou'd be given to your petitioner's predecessor who lately died, the transcript of which writ is attached to this petition; nevertheless, sire, your bailiffs of those parts will not give the said tithe without a further command; wherefore the bishop prays, that having regard to this, that the tithe is due of right, and that it hath been yielded before this time, you wou'd command the said bailiffs, that the tithe may be given as it belongs to him.

Bishop of Landaff.

Answer.—Let the rolls of chancery be searched; and if it be found that such writ was heretofore granted, let such writ be had now.

The king to the keeper of the forest of *Deane*, health. The venerable father *I.* bishop of *Landaff*, hath prayed us by his petition lately exhibited before us, that whereas tithe ought to be given to God and holy church of every thing yearly renewing, and we yearly receive great profit from our mine of iron in our forest aforesaid within the parish of the church of the said bishop of *Newland*, which he holds to his own use, and are willing to yield a tithe to the same church for such kind of profit arising from our mine within the parish of the church aforesaid; we, though it fully appears to us by the certificate thereupon made to us at our command by our treasurer and barons of the exchequer, that no tithes have been heretofore given of such kind of profit, nor any recompence made in times past in lieu of such tithes; willing, nevertheless, to assent to the petition of the said bishop in this behalf, command you of our special grace, that you cause the tithe of such sort of profit arising from our mine of iron within the parish of the church aforesaid, to be henceforth yielded to the same church; and we will make due allowance to you thereof in your account of the aforesaid profit. Witness ourself at *Westminster*, the 15th day of *November* in the 14th year of our reign.

The writ.

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Per ipsum regem.

1330.

Pet. Parl. 4 E. III. No. 80. A. D. 1330.

To our lord the king, and to his council, shew his chaplains, the prior and convent of Saint *Fredeswode* of *Oxford*, that whereas they are parsons of *Acle* and of *Brehalle*, within which parish a great part of the forest of *Bernwood* lies, in which forest Master *John Mautravers*, late keeper of our lord the king of his forests beyond *Trent*, made sale for the king's profit of underwood, whereof the said prior and convent, as parsons of the said place, ought by right of holy church to have the tithe; for which they have lately applied to the said master *John* for so much, while he was keeper, as they ought to have for their tithes, as the right of holy church requires; and he thereupon did nothing; wherefore they pray our said lord the king, for his grace, and that he will order that they be paid their tithes aforesaid:

Answer.—Let the keeper of the forest be commanded to cause the tithe to be paid to . . . as it hath been paid in the time of his progenitors.

 Pet. Parl. 8 E. III. No. 61. A. D. 1334.

To our lord the king, sheweth his clerk *Henry de Kendall*, parson of the church of *Rye*, which is the king's advowson, that none of the fishermen of his said parish yield any tithe of their fisheries to the said parson; wherefore he prays that he may have our said lord the king's permission to sue his action against them for the said tithe in court christian, without incurring the indignation or contempt of our said lord the king.

Answer.—Let him sue if he will.

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 Rot Parl. 21 & 22 E. III. No. 5. A. D. 1347.

To our lord the king, and his council, his poor chaplains the abbot and convent of *La Roche*, parsons of the church of *Haytfield*, pray, that whereas they ought to have yearly* one heifer in the park or woods of *Haytfield*; and also yearly sixteen great beasts in the park or woods aforesaid, in lieu of tithe of herbage; and likewise to have all their pigs within the said parish fed in the woods of *Haytfield*, aforesaid, without paying any pannage for the same in lieu of the tithe of pannage; and also for the tithe of the fishery of *Braythemar* and *Newflet*, a *bind of eels yearly, to be taken as of the right of their church of *Haytfield*; whereof the said abbot and convent have been seised time immemorial, until the manor of *Haytfield* came into the hands of our lord the king, after the death of *John* late earl of *Warren*, and is now in the hands of madam the queen *Philippa*, who holds it of the grant of the king;

* one
heifer.

* one
bind.

wherefore may it please our said lord the king to ordain remedy in this case.

1347.

Answer.—Let proper persons be assigned in chancery, to inquire, in the presence of the queen's keeper there, of the matters contained in the petition; and the inquest being returned into chancery, let the chancellour call before him the said queen's counsel, and the king's serjeants, and any others whom he shall think proper to call; and having heard the reasons which the parties can allege, let him further do law and right.

Rot. Parl. No. 134. *Aunis incertis*, E. III.

To our lord the king, and his council, the abbess of *Godstowe* prays, that whereas our lord the king's ancestors have, by their charters, granted to the abbess and house of *Godstowe*, at the foundation of the church, the tithe of all the venison which shou'd at any time thereafter be taken in the forest of *Whittlewood*; by virtue of which grant, the predecessoress of the now abbess was seised, until *Hugh Le Despenser*, the father, when he was keeper of the said forest, disturbed *Mabille Wafre*, the predecessoress of the now abbess, in the receipt of the said tithe; wherefore she prays remedy.

Answer.—Let her shew the charter in chancery, and thereupon let a writ issue to the justice of the forest, or to his lieutenant, &c. that he cause inquiry to be made whether the predecessoress of the said abbess were seised of this tithe as the petition purports; and which of her predecessoresses was first ousted thereof, and by whom, and for what cause, and of all other necessary things; and the inquest being returned into chancery, let it be shown to the king. [117]

Rot. Parl. 9 H. V. No. 12. M. 5. A.D. 1421.

BE it remembered, that whereas master *Wantier Cook*, parson of the church of *Somersham*, in the diocese of *Lincoln*, commenced a suit in the court of arches of *London* for the recovery of certain tithes of a meadow or marsh, called *Cronlond Mede*, situate within the bounds and limits of the said church, or the tithable places thereof, as of right belonging to the same church, against one *William Whithed*, and others, who were tenants of the abbot of *Ramesey*, regardant to his manor of *Chaterys*, and occupiers thereof, and who wou'd not pay nor yield any tithe thereof; and although the said abbot for this reason made himself a party against the said master *Wantier* in the said suit, alleging in his plea which he pleaded, that the said meadow or marsh was parcel of his said manor, situate within the said parish of *Chaterys*, and in the diocese of *Ely*, and that he ought not to pay any tithe thereof, be-

CASES.

cause it was discharged of the payment of all manner of tithes by papal privilege, and by title of prescription; yet the said parson recovered against them his tithes arising from the said meadow or marsh, by the sentence given in the said court of arches; as by a libel delivered to my lord chancellor of *England*, under the seal of the dean of the same court of arches, and by the same chancellor shewn to this parliament, it more fully appears; whereupon the above mentioned abbot lately came into the king's chancery, and prayed upon the matters contained in the said libel, the king's writ of prohibition to issue out of the said chancery, in order to stop the execution of the said sentence, surmising, among other things, that the question between the said parties upon the matters aforesaid in the said court of arches was by the words of the said libel concerning the bounds and limits of the said meadow or marsh, and not merely concerning the tithes; in which case the court christian cou'd not have conusance. And forasmuch as great alterations and debates were for a long time had and moved in the said chancery, between the counsel for both parties, upon the matters aforesaid, and my said lord chancellor, and the king's clerks of his chancery, cou'd not, by reason of the difficulty, be shortly and rightly advised to do what the law wou'd in this behalf, my said lord chancellor adjourned the matter to this same parliament, and put off and referred the said parties there to hear what might be determined by the advice of the same parliament, according to the effect of the old statute of *Westminster* the second. And afterwards, upon the shewing of all the premises in this same parliament by my said lord chancellor, the said parties being then present, and being heard as to what, by the advice of their counsel, they pleased to say or declare thereupon, by the command of the honourable prince my lord *John* duke of *Bedford*, keeper of *England*, the king's justices as well of the one bench as of the other, and also the chief baron of the exchequer, then present before the said keeper and lords in the same parliament, were firmly charged, that having considered and understood the matters in the said libel contained, whereupon the said abbot made his said prayer, they should give their good advice according to the exigency of the law, for the more sure exhibition of justice in this behalf. Whereupon good and mature deliberation being had by the said justices and barons, and their several reasons afterwards delivered *seriatim* being heard and understood, it was the opinion of the said keeper and lords, according to the advice of the said justices and baron, that no prohibition lay upon the matter aforesaid so prayed against the execution of the said sentence, nor could it lie, nor was it grantable in the case.

M. 30 H. VIII. A.D. 1538.

1538.

[Dyer, 43 a.]

(a) If the parson of a church purchase a manor within his parish, now by this purchase and unity of possession, the manor which was titheable before is made untitheable, because he cannot pay tithes to himself; but, if the parson make a lease of his parsonage and rectory to a stranger, then the parson himself shall pay the tithes of his manor to the lessee of the rectory: and if the parson make a feoffment of the manor, the feoffees shall pay tithes to the parson so enfeoffing, because tithes cannot be extinguished by any unity of possession, as a rent-charge may which is issuing out of the land; but tithes are due by the law of God *ex debito* for the occupation and tillage of the occupier in whose hands soever the land come, if it be not the hands of the parson himself. And all this matter was agreed by the judges and serjeant; but they differed in opinions, Whether if the parson let parcel of his glebe for years or life, reserving rent, the lessee should pay tithes, or not? *Quære inde.*

If the parson purchase a manor within his parish, the unity of possession discharges it of tithes; but when the possession is severed, they revive.

*[119]

E. 7 E. VI. A.D. 1553.

The Dean and Chapter of *Bristol* against *Clerke*.

The Serjeants' Case. [Dyer, 83 a.]

THE case of the new serjeants was, that assize was brought by the dean and chapter of *Bristol* against one *Clerke*, for a portion of tithes in *North Cerney*, in the county of *Gloucester*, in which divers exceptions were taken to the writ, and to the plaint which comprehended the title of the plaintiff, upon which was a demurrer in

Assize of a portion of tithes by a dean and chapter, and demurrer thereto;

(a) *T. 4 Eliz. Rot. 619. in B. R. Wright* libelled in the spiritual court against *Champion* for tithes arising and coming out of the manor of *Newton Valence* in the county of *South Surrey*. *Champion* brought a prohibition, and the matter of law was, A man devises his rectory except his own tithes, and afterwards grants his land, shall the grantees be discharged? *Hobart* thought not, because they are in the grantor by way of detainer. — *T. 36 Eliz. Rot. 506. B. R.* In an action of debt by *Hungerford v. Hawland*, the condition was, that the defendant should suffer the plaintiff, &c. quietly to enjoy his manor of *D.* in the parish of *S.* (where the defendant was parson), and all his other lands, tenements, and hereditaments there, in such and the like sort as the father of the plaintiff, &c. enjoyed, &c. without interruption, suit, or denial, &c. The defendant pleaded conditions performed; the plaintiff replied, that his father, for the space of, &c. before, was seised of the said manor of *D.* and of a portion of tithes, by reason whereof he held the land

discharged, and now the defendant has libelled against him in the spiritual court, &c. Resolved, that the condition was broken; for, notwithstanding the unity of possession, the manor and the portion of tithes out of the manor continue several, and both descend to the plaintiff, so that at the time of making the obligation, and afterwards, the manor is discharged of tithes; wherefore judgment was entered for the plaintiff, especially because of the word *hereditament* in the condition. — *M. 31 and 32 Eliz.* In prohibition between *Perkins and Hinde*, parson of *Babington*, [*Cro. Eliz. 161. 11 Co. 13. b.*] the case was, That the said parson, by deed indented, leased his glebe, with the profits and advantages thereto belonging, for ninety-five years, rendering five pounds for all exactions and demands whatsoever to the said rectory for the aforesaid close belonging; and the question was, Whether the lessee should have the said close discharged of tithes during the term? And resolved by the court, that the tithes shall not pass by such general words.

1553.

The Serjeant's Case.

because,

1. The writ was *de libero tenemento*.

2. The tenant was not joined with the disseisor in the writ.

3. A plaint of "a certain portion," &c. is uncertain.

4. The statute 32 H. 8. c. 7. is not set out.

5. The writ was of tithes in *demesne* as of fee.6. For that the title was pleaded double, *s.* that *I. late prior, &c.* was seised, &c. in right of his church; and that he and all his predecessors were seised, &c. from time, &c.7. It is uncertain to what the words "*by virtue whereof*" in the title refer.

8. The king is not stated to be seised of the tithes in right of his crown.

9. The christian

name of the dean is omitted. 10. For that the tithes in suit are not averred to be parcel of the *demesnes* of the archbishop of York, late in the tenure of *E. T.* as they were described in the king's grant of them.

law. The first was, because the writ was of *freehold* where it should be of a *portion of tithes*. Also, that the writ ought to have been brought as well against the tenant of the land as against the disseisor, as in assize of rent charge. But see statute 32 H. 8. c. 7. which answers this exception. Also, for that the plaint is uncertain, *s.* "of a certain portion of tithes of sheaves of corn, hay, wool, and lambs, annually arising, renewing, and growing of and in two hundred acres of land, twenty acres of meadow, and one hundred acres of pasture, with the appurtenances, in North Cerney." Also, that the statute 32 H. 8. c. 7. which gives temporal actions for tithes and spiritual profits, ought of necessity to be recited in the plaint. Also, for that the form of pleading, which was, *s.* of a portion of tithes, &c. in his demesne as of fee, is not good; for tithes are not in *demesne* any more than an advowson. Also, that the title was double, because it is alleged that *one I. late prior of S. was seised, &c. in fee in right of his church*, and that *he and all his predecessors were seised, &c. from time immemorial*; and so the prescription carries a double face. Also, for that the words in the title, *s.* by virtue whereof, are uncertain to what thing they shall be referred. Also, it is alleged that king H. 8. was seised of the said portion by reason of the suppression of the said late priory, which was under three hundred marks in his demesne as of fee, without saying in right of his crown, and in fact by the act of suppression, in 27 H. 8. (which is not printed) [it is now c. 28.] the possessions of such little abbies and monasteries are annexed to the crown. Also in the conveyance of the said portion of tithes by the grant of king H. 8. to the said dean and chapter, the christian name of the said dean is omitted. Also it is alleged, that the said king H. 8. gave and granted the aforesaid portion of tithes *inter alia*, by the name of the entire portion of tithes arising, &c. out of the demesne lands of the archbishop of York, lying and being in North C. in the said county of G. called the late monastery, now appertaining, &c. and then, or lately being, in the tenure of *E. Tame, Knight, &c.* and there is no averment in fact, that the lands put in view of which, &c. were demesne lands of the archbishop, and in the tenure of *E. Tame*. And this was the most doubtful and material exception, by the judges. Also, the matter in law is, Whether the dean and chapter, being a body politic, of whom the statute makes no mention, only of a person or persons, be within the benefit of the statute? and also, Whether the tithes in their hands, being spiritual persons, can be demanded in the temporal courts, as lay or temporal things, or not? and, Whether the tithes, by the statute

of 27 [*H. 8. c. 28.*] (which is the statute of this suppression) or by the 32 [*H. 8. c. 7.*] are made lay or temporal by any words in the said statutes?

(a) 1. As to the first exception, it seems that the writ is good; for when a man hath a special remedy, at the common law provided for by writ in the register, which serves only for one case, and for one thing, and afterwards a like remedy is provided by the statute in another case, and for another thing than there was any help for at the common law, the general writ, ready framed, shall serve in the new case, and the special matter shall be shewn in the count, unless a special writ be expressly provided in the statute; as the writ of *cui in vitâ*, at common law, served only upon a discontinuance, in which the demise of the husband is supposed by the writ, and by the statute of *Westm. 2. c. 3.* a *cui in vitâ* is given upon a recovery by defendant, and no form of writ there framed, wherefore the common writ supposing a demise, which is false in fact, shall serve, &c. So divers writs of *præcipe quod reddat* are now by statute against *cestuy que use*, and pignor of the profits, although he is not tenant of the land: the form of the writ at common law is not altered by that: so the statute of 4 *H. 7. [c. 17.]* gives a writ of right of ward for the heir and land of *cestuy que use* of land holden by knight-service; as if the ancestor had died seised in *demesne*, the writ of ward at the common law shall serve, which supposes that the ancestor held his land by knight-service, which is false, but the special matter shall be declared in the declaration. So the tenant by *elegit*, or statute, who hath only a term and chattel, shall have assize if he be ejected, by the statute, as of freehold, and the form of the writ is of freehold, and not of a term, &c. Then if a general writ shall serve in a new case where the writ in its supposal is false, *à fortiori*, the general writ of assize in this case, which is not false but true (for tithes are now at this day made lay and freehold by reason of the said statute,) shall well serve. And although the said statute of 32 *H. 8.* that a man shall have original writs for tithes, as the case shall require, to be devised and granted in the king's court of chancery, yet if the chancellor think this general form of writ of assize of novel disseisin good, without devising a new form, that is well enough in this court; but we have a doctrine, that if a man have a writ framed in the register for his special case besides the general writ, and he use the general writ for his special case, it shall abate, as in assize of common, the writ shall be of common of pasture, and there are no forms of writs of assize except those two, wherefore, &c. And see 7 *H. 7. [2. a]* in

1553.

The Serjeant's Case.

Answer to
1 Obj.
In an assize
for tithes,
the writ
shall be *de
libero tene-
mento*, and
the plaint
and title
therein shall
be special.

[122]

a) Note, that assize of tithes did not lie at common law, 21 *H. 7. 3. b.* by *Elliot*.

1553. trespass by the husband and wife of a close broken, and his goods taken, and count of a trespass done to the wife while single, that shall abate the writ, &c.

The Serjeant's Case.

Answer to
2 Obj.
Assize lies
of tithes in
the hands
of the per-
nor without
naming the
terre-ten-
nant.

As to the second exception, s. Whether the tenant of the land shall be named in this case, or not? — it seemed that he needs not, for the words of the statute 32 [H. 8. c. 7. § 7.] are, “*that if any one be disseised, deforced, wronged, or otherwise kept from their lawful inheritance, state, seisin, possession, &c. by any other person or persons claiming, or pretending to have interest or title in or to the same, that then the person so disseised, deforced, wronged, &c. shall have their remedy in the king's temporal courts, &c. as the case shall require, for the recovery, getting, or obtaining, &c. by original writs of *præcipe quod reddat*, assize of novel disseisin, mort d'ancestor, &c. in like manner and form as they should or might do, for lands, tenements, or hereditaments, in such manner to be demanded;*” wherefore it is not necessary to name the tenant of the land, as in assize of rent charge or seck, which are things against common right, &c. And besides, for any thing that is yet shewn, the tenant in assize may be tenant of the land, &c. for he hath demurred in law to the title, and no plea is offered that there is no tenant of the land named in the assize, wherefore it seems that this point ought not to be argued in this case. It seems also that no man can be tenant or pernor of a tythe but he who takes it; and there is a difference between rent and tithe, for tithe is not issuant out of the land as rent is, nor to be paid by the hands of the tenant, as rent is. See for that, the case 40 E. 3. [24. pl. 25.] that great default is in the tenant if the rent be not paid, and he shall be adjudged a disseisor. Also, note the last proviso in the statute of 32, that against him who refuses or denies to set out his tithes, or detains them, remedy is only given in the ecclesiastical court.

Answer to
3 Obj.
In assize,
plaint of a
certain por-
tion of tithes
is good and
certain
enough.

[123]

“*Of a certain portion of tithes, &c.*” This seems good enough, and cannot be devised any better. And, first, It is common learning in the Book of Assize in divers places, that a man needs not use such precision and certainty in the plaint of an assize as in other writs of *præcipe quod reddat*; for in 8 Ass. [1.] wood was put before pasture in a plaint, which is contrary to the order and form of a *præcipe quod reddat*, according to the verse: and a plaint was of the annual rent of one robe, or twenty shillings, in the disjunctive, which would not have been good in a *præcipe quod reddat*; and of a *certain* piece of land, and that is good in assize without any contents certain. (a) So one brought a plaint in *D.* only, and

(a) T. 16 Jac. B. R. Land in the parish of repairs of that of *A. Green's* case. — E. 43 El. A. by prescription may be liable to the repairs of B. R. *Sir Mile's Lands v. Drury*, [Cro. Eliz. the parish church of B. and discharged from the 814.], the question in this case was, Whether

there were two *D.*'s in the county, and neither of them without an addition, yet the assize and plaint was well enough; and the reason as I understand is, that the judgment in assize differs from other writs, for he recovers seisin of the thing put in plaint by the view of the recognitors, and it is sufficient if the thing in plaint be so certain and plain that the recognitors can put the plaintiff in possession. And now because this term "*portion of tithes*" is uncertain, and unknown in our law, it is necessary to consider its nature and quality for the ministering of our law now, because it is incorporated and made parcel of the body of our common law. I understand a *portion of tithes* to be where a man hath any profit of tithes within the parish of another parson, or vicar, and its origin was before the council of *Lateran*, at which time it was lawful for every one to distribute and pay as he chose his tithes, or any portion thereof, to any church, according to his best devotion: and there was no restraint to any church or parish in certain; so by continuance that grew to a right and title, and it was therefore given for prayer, or devotion, &c. Then to consider the certainty here, in every word of the plaint is certainty. First, the word "*certain*" is an adjective or relative which expresses a certainty and particularity, and especially in the singular number, unless it be coupled with an adjective or substantive uncertain, as "*a certain person unknown*," and "*of the death of one unknown*, &c." for then it does not make any demonstration; but being joined with a substantive certain, as "*in a certain place called*," it is otherwise; so here "*portion*" is a substantive, and by the words following, *s. of tithes of sheaves of corn, hay, wool, and lambs*, the kind and quality of the tithes are named and expressed: and here the measure or quantity of tithes cannot be expressed; for although the defendant, in the year of the disseisin committed, took one hundred sheaves of corn, two cart-loads of hay, two stones or pounds of wool, and ten lambs, yet the disseisin is made of the entire tithe, which is a thing uncertain in number, for the goodness and fruitfulness of the year is casual and uncertain, and for that reason it is impossible to limit the portion more certainly. And besides, it is alleged and declared that this portion of tithe is a thing of long continuance and antiquity, and in the country there the certainty and quantity is well known, so that the plaintiff may well recover his seisin of this portion of tithes by the view of the recognitors, &c. wherefore, &c. And see *H. 11 H. 4.* [40. a. pl. 4.] In debt — *præcipe quod reddat a certain portion* of land is good by *Skrene*, and allowed by *Hill* without shewing how much that portion consists

1553.

The Serjeant's Case.

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tithes might be demised by copy of court roll? council of *Lateran*, and so their origin as to this
By *Dodderidge* they cannot; for although tithes church was by those constitutions, and not by
have been immemorially to be paid, yet a parson custom.
might claim them before any other until the

1553. of. And besides the statute 32 H. 8. is plain, that assize and *præcipe quod reddat*, lie for a portion of tithes; wherefore, &c.

*The Ser-
jeant's Case.*

Answer to
4 Obj.
32 H. 8.
c. 7. is a
general sta-
tute, and in
assize for
tithes need
not be re-
cited.

The statute of 32 H. 8. needs not to be set out; and that for two reasons: 1. Because that statute is general and universal, and runs over the whole kingdom, and concerns every person or persons who have any such spiritual profit: then the judges of every court are especially bound to take notice of this law, inasmuch as it gives them jurisdiction and power to hold plea of that, which, before the statute, the common law took no cognizance of; and such general law is not of necessity to be alleged: and this was ruled in error, 37 H. 6. [15. pl. 5.] *sub fine*, in the exchequer chamber. Also in 4 E. 4. [22. a. b.] in the case of *Lord Hungerford*, in traverse, and other books: and so it is, when a man is acquitted by a general pardon, by parliament; and he, being arraigned, does not plead it, but puts himself upon trial, and is acquitted; he shall not have conspiracy, for he was not legally acquitted; since the judges ought to have allowed him his pardon without pleading it. And further, this statute doth not give any new writ or action which was not before at common law; but joins and annexes other things which are to be demanded by writs original at common law; by which they were not demandable before. And therefore it may be well likened to the case of 14 H. 4. [20. a.] in maintenance; where the case was, that conuzance of plea was granted to *Bristol* of all pleas; and afterwards, there was an action of debt given by statute for a thing, for which no action of debt lay before; they shall have conuzance of this action, because the same action was before at common law: but if the statute had given a new action which never was before, it is otherwise; so here, &c. And this statute also gives a power and jurisdiction to the temporal courts to hold plea of tithes in these cases: and I never understood, that the plaintiff shall be compelled to shew the power and authority of the judges and court in his writ or declaration; but that is for the defendant to allege, and to take exception to the jurisdiction of the court, as well as on account of disability of the person of the plaintiff, and things of that sort; and, for these reasons, I think that he is under no necessity to allege the statute, any more than it hath been usual for the statute of R. 3. [1. c. 1.] to be alleged, when a man pleaded a feoffment of *cestuy que use*; or at this day, if a man plead a feoffment to an use, it is more than is necessary to allege the use, executed by force of the statute of uses, 27 H. 8. [c. 10.] And so at this day, if a man will plead a devise by will, shall he be forced to allege the statute of wills? It seems clearly he shall not. Wherefore, &c.

Answer to
5 Obj.

It seems also, that tithes are *demesne*, for they are tangible and visible; and also the esplees alleged in a writ of right of advowson

of the church, or of tithes, are in *prender* of great tithes and small tithes, and in oblations, &c. therefore it is not like a reversion, suit, fealty, or such like, which are not tangible. Wherefore, &c.

It seems also, that the prescription doth not make the title double, for the seisin of the portion (only) doth not make a good title in the prior of S. any more than of a rent, or any other thing or profit in the soil or fee of another, which commenced against common right: for, in all these cases, the commencement of it ought of necessity to be alleged by him who is to make title to it, whether he be a privy or stranger thereto: for it is contrary to reason to charge the inheritance or freehold of another, without shewing a substantial foundation for it. Then here admit, that the prior had been seised of this portion, which ought to be intended to be in the parish of which the prior himself was neither parson nor vicar, shall this seisin make him a title to this portion without prescription? I think not: and then the seisin is not material, nor traversable, but only the prescription; for the king cannot make other title to it than the prior himself, who could by no means make out a good title to himself, but by grant or prescription. Wherefore, &c. Besides, the prescription declares the manner in which the prior was seized, *s. from time immemorial*; and there, this only is traversible, and not the seisin, for he cannot allege the prescription if he do not allege the seisin also: as in a *scire facias* to execute a fine, the seisin of his ancestor with a feoffment is not double, for he cannot allege the one without the other; so here, &c.

“*By virtue whereof*,” it seems that these words should, of necessity, be referred to all the mean degrees and steps before expressed, by which the said portion is conveyed to the possession of the king; of which, the first degree is the seisin of the prior by prescription: the second, the suppression of the priory by act of parliament in 27, (a) with the averment that it was under the value of two hundred pounds *per ann.* and also one of the three orders or habits of religion, *s. monks, canons, and nuns*; the third step is that the king by the act is deemed and judged in actual and real possession of the portion: and all these matters are degrees and means to induce title to the possession of the king, and no one of them is sufficient to do this without the other, but altogether are. And the nature of these words “*by virtue whereof*,” is well explained and declared in 7 H. 7. [3, 4.] in trespass for trees cut and carried away, where it is holden, that the “*by virtue whereof*” *nec auget nec minuit sententiam sed tantum confirmat premissa*: as if the defendant there pleaded a feoffment of the soil where trees grow, made to the plaintiff for the use of a stranger, “*by virtue whereof*” the stranger granted the trees to the defendant, that is bad; for the feoffment to an use did not make the grant good, without

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T
jeant's Case.

Assize of tithes in *demesne* is good.

Answer to 6 Obj.

In assize for a portion of tithes, demandant prescribes in the prior of S. This is not a double title.

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Answer to 7 Obj.

(a)
[Hen. 7.]

1553. averring the continuance of the use until the grant of the trees, which thing is not implied by the "*by virtue whereof*;" whereof, as I understand it, a better form of pleading could not be devised than was in this case.

The Serjeant's Case.

Answer to 8 Obj.

It is sufficient to say in assize for tithes come to the king by the suppression of an abbey, that he is seised thereof in his demesne as of fee, without saying, in right of his crown.

"*In his demesne as of fee.*" This seems good enough, without saying "*in right of his crown*," and is the best mode of pleading; for it appears before by the statute, that the king ought to have the said monasteries, to do with them according to his good pleasure, for the honour of God, and the weal of the kingdom: and then to make the law clear, and without any doubt, this is better pleaded than to say "*in right of his crown*;" for this might create an argument and doubt, whether he could sever it from his crown or not, although it seems sufficiently clear that he might; yet to allege that which is dubious and disputable, when it may well be alleged fully and clearly; would be impolitic in pleading. And let us grant also, that it were necessary to allege "*in right of his crown*," still the manner of pleading before is such, that the

[127] king necessarily must be seised, as if the act gave it him by intendment, although it is not expressly alleged, for the statute annexed it to the crown. And see *E. 34. H. 6. [34. b.] in quare impedit*, this exception over-ruled, where conveyance was made of an advowson of king *Hen. 6.* who came to it by descent, and it was parcel of the possessions of alien priors, which were annexed to the crown by parliament in the time of *Hen. 4th.* or *5th.*

Answer to 9 Obj.

Dean and chapter bringing assize for tithes, need not mention the dean by name.

(a) It seems that it is not necessary to mention the dean by his name, any more in the conveyance of the title for the portion made to the dean and chapter, than in the original writ of assize. And no one will deny, but when a dean and chapter, who are an entire body politick, are to commence any action, the best way is to omit the name of the dean, for fear of a change of the dean by death, or otherwise, by which the writ may abate, as is adjudged in *21 E. 4. fol. 19. [15. a. b.]* And I take a great diversity between where one is sole seised in right of his deanery, and where in common with the chapter; for it may be agreed for law in the first case, that if the dean alone be entitled to an action real, he must call himself by his christian name, that it may appear whether the cause of action commenced in his time, or in the time of his predecessor. As if a disseisin be made to a dean, or an erroneous judgment, or false oath, and he die, his successor shall not have an assize of novel disseisin, but a writ of entry upon disseisin in the

(a) *H. 32 El. [1 And. 248.] Carter v. Crumwell*, in *ejectione firmæ*, the plaintiff declared upon a lease made by the warden and college of *All Souls in Oxford*, and exception was taken because the christian name of the warden was omitted, and it was adjudged unnecessary; and a difference taken where the corporation consists of one person only, as a bishop, there he should be named; otherwise, if of many, as a dean and chapter, mayor, and commonalty.

quibus, or a writ of error, or attaint, and name himself, because he was not a party to the judgment; but in the other, *s.* where the dean is seised in common with the chapter, there, although he die, still his successor, and the chapter together, shall have assize of novel disseisin, or error, or attaint, as the case is, without naming the dean in certain, because the dean is not dead, but hath always continuance. And therefore in 14 *H.* 7. [31. b.] it is holden, that a dean and chapter, or a prior and convent, without naming the superior by his proper name, granting by their common seal an annuity until promotion to a benefice by the aforesaid dean or prior, their successor may tender a benefice; but if they be named, there the contrary is holden, because the aforesaid dean or prior shall refer only to the dean or prior by name, and to none others. And here the proper name of the corporation and body politick is *the dean and chapter of B.* &c.; and by this name they are enabled to purchase, sue and be sued, and not by any christian name. And also the truth in this case is, that the dean, who was the plaintiff in the assize, was the first dean of this corporation, the commencement of which was only in the 24th of *Hen.* 8. which is only seven years since the erection; wherefore it can no otherwise be intended but the same dean to whom the first grant was made; and see 13 *E.* 4. 8. b. holden by *Choke*, that although it is usual to allege the name of the mayor, who is the head of the corporation, yet he had seen such general pleading, without naming the head, adjudged good. And see a good case of that, *H.* 17. *E.* 9. [1. b.] of a *scire facias* brought by the successor of a dean and chapter, upon a recovery against an abbot, since dead, without naming the proper name of the dean, but of the abbot; he shewed a diversity between the late abbot and the present abbot, but that cannot be of a dean and chapter.

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It seems too, that no averment is necessary; and that for divers reasons: 1st. The plaintiffs, in the premises and commencement of their title, shew, that the portion of their tithes, now in plaint, is issuant out of two hundred acres of land, &c. in *N.* whereof the late prior was seised in fee by prescription; and that before any title or seisin in the king; and then they proceed in their title, and convey it by due and legal means to the king; and that the king was seised of that in fee, and so being seised, made a grant to them of the portion aforesaid, by the name, &c. so that the foundation of their title was not of the king only, but they also make conveyance of the king's title, *s.* from the prior: and then it much varies the case, whether the title have its origin of the king only, for then perchance all the words in the king's grant ought to be verified, and especially when it wants certainty. As where the king granted *all his lands which he had by the attainder of*

Answer to 10 Ob.
In assize of tithes, plaint that K.
H. 8. gave them per nomen of those tithes arising out of the demesne lands of the archbishop of York, and lately in the tenure of T.
It is not necessary to aver that the lands put in view were the demesne

1553. *I. S.* if a man would convey by such grants, he ought to aver that *I. S. had such lands, &c.* The law is the same in the case of a common person who releases *all his right in all such lands as descend to him of the part of his mother in D.* there ought to be an averment that *the lands, &c. descend of the part of his mother*; for otherwise, the release is void, by reason of the generality and uncertainty, &c. And see this 2 *E.* 4. fol. ult. And yet in 1. *H.* 7. [28. b. 29. a.]

[129] in assize, it was ruled by all the judges, that if a feoffment be made by deed of lands by the name of *all the lands which he hath of the gift of such a one*, the tenant ought to plead this feoffment by deed, without taking any averment: as, if it were made to him by the name of *I. S.* where his name is also *I. D.* because he may be known by one or the other; otherwise is it of a christian name; but there it is holden, that the best pleading is by the name comprised in the deed: and therefore in 26. Ass. [119. a. pl. 2.] it was ruled in an assize brought in *D.* where the tenant pleaded joint-tenancy of the land in plaint, by a deed of land in *S.* that that was good enough, without averring that *S.* is an hamlet of *D.* because the vill may have two names, the one true, and the other a nickname. (a) So, when any certainty is in the grant, although there be a superfluous addition in the grant, that is not material, nor shall impair it: as is the case in 20. Ass. [8.] A man made a grant of twenty cart-loads of wood in the wood of *D. which he had of the gift and grant of his father*; the grantee was not driven to shew any writing of the father, because by the premises the soil was sufficiently charged, &c. And so in the case of 9 *H.* 6. [12.] of an annuity granted by the queen, *percipiend' de magna custumar' of London*, the grant was ruled good, and the *percipiend'* void, &c. And so in 2 *E.* 4. [29. b.] A man released all his right in *White-acre* in *D.* which he had *by hereditary descent* from his father, although he had it *by purchase or disseisin*, it is well enough, &c. Then here, at the time that the king granted this portion of tithes which appertained to the said late prior, it may be that the said two hundred acres whereof, &c. were the *demesne of the archbishop of York*; and then the king inserted those words in his grant, to make it more certain, and to give another name to the portion which it had before; for before, it was known by the name of a portion of tithes in *N.* belonging to the priory of *S.* and by that name it appears that the king in his grant assented; but he added

(a) Customs and subsidies have been formerly *ampten*. So Edward 4. anno 12. secured his assigned by our kings to their subjects, as *H.* 6. debts by assigning over the next subsidy and aid assigned over to Cardinal Beaufort, ann. 22. for that should be granted from the church or laity. his security for a debt of sixteen hundred pounds Act. Cons. 22 *H.* 6. Bill Signat. 12 *E.* 4. due to him, the customs of London and South-

more to that as above, which addition is peradventure false, and perhaps true: and so of *the tenure of E. Tame*. And if neither of them were true, yet by the statute 34 & 35 H. 8. c. 21. this misrecital of *late farmer or occupier* does not make the patent void. Then if the portion passed by the patent, that sufficeth for the plaintiff; for it would have been folly to take an averment of this title to a thing which was false, and which is immaterial whether false or true, as the case is here. And the counsel of the plaintiff would ill have deserved their fee (of whom I was one), had they alleged this averment of the title in the plaint, which had it been found false, ought to destroy the entire title of the plaintiffs, &c. Wherefore, in my opinion, as it is here pleaded, the portion of tithe is conveyed sufficiently from the prior to the king, and from the king to the plaintiff by name, &c. And the pleading is, "*the aforesaid portion*," which cannot be any new one, or other portion derived from the king; and since the defendant hath demurred in law upon this plaint, he hath acknowledged that the king's grant was of the same portion that issued out of the land put in view, &c. And, therefore, I think the pleading good without averment, &c.

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M. 1 & 2 Eliz. A. D. 1558-9.

Pelles against Saunderson in B. R. [Dyer, 170 b.]

(a) THE farmer of a rectory sued one of his parish in the ecclesiastical court for tithes of *wheat* and *rye* growing in sixty acres of land, and the defendant * sued a prohibition upon the statute 2 & 3 E. 6. [c. 13.] suggesting that all the sixty acres were bar-

On a prohibition to a suit for tithes of [^{*Orig. sur.}] *wheat*,

(a) Fens or marsh grounds which are drained shall pay tithes in 67 [7] years, and not sooner, 2 E. 6. c. 13. *Trin. 38 El. B. R.* — *Hil. 5 Car. C. B. Sconie's case*. It was resolved that tithes are due and payable of all mills, unless they be as ancient as 9 E. 2. and before; for mills more ancient are discharged of tithes by the stat. *Art. Cler.* [c. 5.] — *Hil. 5 Car. C. B. Between Pain and Evans*, a prohibition was awarded to the bishop of *St. Asaph*, where it was awarded that tithes shall not be paid of ancient mills, s. before the time 9 E. 2. and there also it was holden by the court, that if such ancient mill fall, and be rebuilt upon the ancient foundation, the discharge of tithes shall hold good and revive. — *East. 10 Car. Serjeant Hucham moved*, that before the statute *de clero* no tithes at all were payable for mills, but the said statute was *lex inde creatio*. But *per Cur'* it was adjudged that the common tradition, that no tithes are due of ancient mills, is to be understood of very ancient mills, s. before 9 E. 2. only; for after that, and before memory of our ancestors, they ought to pay tithes. Bro. [Prohibition.]

The case of *Tanner and Kirkham* in [*Coke's*] New Book of Entries, 463. — Barren ground is understood by the opinion and judgment of the common law, to be whereof no profit ariseth or groweth; and that ground which hath been stubbed, and after beareth corn or grass, is not barren. Waste ground is understood such ground as no man doth challenge as his own, or no man can tell to whom it certainly belongeth, and lieth uninclosed and unbounded with hedge and ditch; but the ground that lieth inclosed and hedged and ditched in, and the land known, is no waste ground. *Quod nota per Curiam*. Heath ground is understood that ground that is dispersed, and lieth at common. Bendloes [80. pl. 122.] — *E. 41 Eliz. A. sued in the court christian for tithes of pigeons, and other tithes, and had sentence, although the defendant had tendered one single witness of the payment of tithes of pigeons; and upon this suggestion a prohibition was awarded, and afterwards a consultation for the residue; with exception that they in the court christian should not proceed to give costs for the pigeons.*

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the land being suggested to be lately improved, was proved so, but that tithes of wool and lambs had been always paid for it: though by the statute the same tithes continue payable for 7 years, the parson cannot have a consultation, for he has not sued for tithes of these.

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ren heath and waste grounds, and by reason of the barrenness have not been charged within time of memory with any tithes until the plaintiff had improved thirty acres of it, and converted it to tillage, &c. so that by the intendment of a proviso in the said statute, (although by express words such ground is not discharged of tithes for seven years after the improvement), he ought to pay no tithes within seven years, &c. and proved that suggestion within the six months by witnesses according to the act. And upon the attachment the parties appeared, and the defendant in it defended the contempt, &c. but he took no traverse to it; for it is not the practice in *B. R.* as it is said; and pleaded that the said sixty acres were fruitful, and not barren, as the plaintiff supposed, and upon this joined issue with the plaintiff; and it was found by verdict, that as for thirty of the said acres they were barren, as the plaintiff had suggested; and as to the residue, they found that it had paid tithes of wool and lambs at all times, &c. (a) And by the opinion of the judges of both benches, (except *Whyddon*), the party who sued in the spiritual court shall have a consultation for the said residue: to which *Saunders*, Chief Baron, agreed. Note, the above statute was mistaken, for the parliament was supposed to commence on the 4th day of *November*, in the 2d year of *E. 6.* which was false, for it was a session by prorogation. And yet afterwards, upon better advisement and examination of the verdict, which in the premises of it is found for the plaintiff in the prohibition, *s.* that it was barren, as the plaintiff had supposed, and that it was so barren, that on account of the barrenness thereof none had paid tithes, although afterwards they find that for thirty acres they had paid wool and lambs; and because by another proviso in the same act such tithes as were paid before shall be paid within the seven years after the improvement, &c. and not any tithes of other nature; and because the libel was not for other tithes in the said sixty acres, but only for wheat and rye; the party could not have a consultation, but was told that he might commence a new suit in the court christian for tithes of wool and lambs in the thirty acres not improved.

(a) *M. 42 and 43 Eliz. Rot. 227. B. R. Webb* v. *Beal* [Cro. Eliz. 819.] Upon prohibition the plaintiff suggested that he had been used from time whereof, &c. to pay three shillings and fourpence for all great and *small tithes except corn growing upon seventy acres of land, and made his proof by two witnesses according to the statute; but they testified that the course was to pay four shillings, and by the judges a prohibition was awarded; for although he has failed in the proof of his prescription, yet so much is proved, that

the spiritual court has no cause to proceed for tithes in kind. *Dodderidge* said, that *M. 34 and 35 El. Bird and Collingworth*, in a like case a consultation was awarded. *Popham* answered, that the opinion of the judges of *C. B.* is now to the contrary, for when a *modus decimandi* in one sort is suggested and another proved, we ought not to award a consultation to give them authority to sue for tithes in kind, but to sue for tithes in such kind as is proved.

* The original is *nicon*, perhaps for *nient* (less), by mistake.

T. 10 Eliz. A. D. 1567.

Stathome's Case. [Dyer, 277 b.]

(a) THE prior of the dissolved house of *St. John's of Jerusalem* had this privilege from *Rome*, *s.* "That the Cistertians, Temp-lars, and Hospitalers, should not be bound to pay the tithes of their farms which they cultivate with their own hands, or at their own expence;" but their farmers and all other occupiers paid tithes according to the statute 2 H. 4. c. 4. The said prior with his brethren made a lease of a manor for years, two or three years before the dissolution, which lessee paid tithes to the church of *Rochester*, as appropriate. And after the dissolution the king granted the reversion of the manor to one *Stathome*, and to his heirs, in as ample manner as the prior, &c. The lease is expired; Whether he and his heirs, having the manor in their own hands, shall be discharged of tithes or not, was in question in the chancery. And upon considering the statute 31 H. 8. c. 13. it seemed before the lord keeper to *Catlyn*, *Saunders*, *Southcot*, and *Dyer*, and to his lordship himself, that they shall be discharged until they let and set it to farm, &c. (b)

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Lands in the hands of the prior of *St. John's of Jerusalem* [133] are exempt from tithes, but his farmer pays—he makes a lease, and during the term the house is dissolved, and the king grants the reversion, his patentee shall hold the land free from tithes, but his lessee shall pay.

H. 17 Eliz. A. D. 1574.

[Plowd. 470.]

It appears by the record, that the plaintiff complains against the defendant, for that whereas by the statute of 45 Ed. 3. c. 3. it is ordained that no tithes shall be given of great trees of the growth

The case. *Hil. Term* 17 Eliz. *Hornbeam*.

(a) This privilege of the *Cistertians* extends to their woods, and meadows, and pastures, as *Foster* cites to have been adjudged, that pasture near *London* which was in the hands of the hospitalers was discharged from tithes. — *Mich. 18 Jac. C.B.* it was said by the court that the council of *Lateran* made in 17 *John* [See 2 Inst. 652.] discharged the friars of the order of *Cistertians*; and that this only discharges all possessions then in their hands and not others. [Bul. Ni. Pr. 189.] *Hil. 2 Jac.* between *Quarles* and *Spurling* [Cro. Jac. 57. Mo. 913.], it was adjudged, that the lands of the prior of *St. John's* should pay tithes in whatever hands they are, because they were not dissolved by the statute of 31 H. 8. [c. 13.] but by a special statute of 39 H. 8. [32 H. 8. c. 24.] which is as high a means as the statute of 31 H. 8. And the statute of 31 H. 8. which says that the lands shall be discharged which afterwards come by any means, shall be construed by any inferior means, according to the resolution in the archbishop of *Canterbury's* case. [2 Co. 46.] — *Hil. 17 Jac. B. R.* *Porter v. Bathurst*. [Palm. 118. 2 Rol. 142. Cro. Jac. 559.] In a prohibition a suggestion was, that the abbot of *R.* was seised in fee of the manor of *A.* from time whereof, &c. and that the abbot was of the order of *Cistertians*, which order was discharged, &c. and died. Stat. 31 H. 8. Issue was joined that the abbot did not hold it

discharged in manner and form: the jury found as above, and moreover, that in 15 H. 8. *William*, then abbot of *R.* leased for thirty years, and that during this lease the abbey was dissolved, and the lessee at the time of the dissolution paid tithes. And whether that shall be a sufficient discharge for the now feoffee who manures, and occupies it in his own hands, was the question. And judgment was given that tithes should not be paid. *Montague*, Chief Justice. Where the suspense is by lease, and [there was] payment of tithes, in case of unity there the prescription is destroyed, but where the prescription is by reason of the order, there, although it be in lease at the time of the dissolution, still the privilege of the order remains when the land comes back into their own hands. It was resolved by *all the justices*, *B. R. M. 2 Cnr.* that tithes should not be paid by farmers of the lands of *St. John of Jerusalem*, of such land as was in the hands of the priory. See the case between *Quarles* and *Spurling* in prohibition, *M. 1 Jac.* in the star-chamber, adjudged *contra* to this, and this house of *St. John's* came to the king by the act of 32 H. 8. And it did not give exemption of tithes, as the statute 31 H. 8.

(b) See *Cornwallis v. Spurling*, Cro. Jac. 57. post. 224. *Whitton v. Weston*, post. 410. *Hanson v. Fielding*, Gilb. Equ. Rep. 225. post. 663. *Fosset v. Franklin*, See T. Raym. 225. post. 1579.)

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Anon.

pollengers, though of the age of 20 years and more, are not such great wood as is intended by the statute of 45 Ed. 3. c. 3. for they are not timber, nor serviceable in building, but only fit for fuel, and therefore if they are cut down at that or any greater age whatever, tithe shall be paid for them, and by the same reason tithe shall also be paid for the branches and loppings of them, though they are of the age of 20 years and more.

of 20 years, and more, yet the defendant hath drawn him into the court christian, the 20th day of *April*, in the 14th year of the present queen, for withdrawing the tithes of branches, called Loppings, of certain great trees growing in a place called *Gine's Park*, within the parish of *Thaidon-Garnon*, and cut down by the plaintiff, where in fact the said trees, and also the branches cut down, were of the growth of 20 years, and more. And to this the defendant has pleaded in bar, that the branches called Loppings of trees, for the tithe whereof he sued, were branches of trees called Hornbeam-pollengers, growing in the said place called *Gine's Park*, within the said parish, and that the said trees, upon which the said branches grew, were topped and lopped before any of the branches, for which the tithes were demanded, grew, and therefore that he (the defendant) being parson at the time of cutting them down, drew the plaintiff into suit for the tithes, as it was lawful for him to do. And upon this they demurred in law.

And the matter was argued at large at the bar, by *Atkinson* on the one side, and by *Anderson* on the other side. And *Bell*, an apprentice, was also of counsel in the case. And he spoke to the matter the same day with the other counsel, after their arguments on both sides. And it was said against the defendant, that he ought not to have tithes here, because the trees are old trees above the age of 20 years, in which case they are an inheritance; and for cutting down trees above the age of 20 years, a man shall have an action of waste, and shall say therein that the termor has cut them down to his disherison. And if a man has an inheritance in the trees, and they themselves are an inheritance, thence it follows that no tithe shall be paid of them, for tithes are payable of the increase of the inheritance, as of hay, apples, and such like, which are chattels, but not of that which is an inheritance in itself, as trees above the age of 20 years are. And this is proved by the said statute of 45 Ed. 3. c. 3. which ordains *that touching tithes of great wood of the age of 20 years, or of greater age, a prohibition in such case shall be granted upon attachment, as hath been used before this time*; which words (*as hath been used before this time*) shew us what the common law was, and that at the common law tithes were not payable for great wood before the said statute, so that the statute is made in confirmation of the common law. And to this purpose was cited the opinion of *Belknap*, in 50 Ed. 3. in the case of an attachment upon a prohibition for a suit in the spiritual court for the tithes of great trees, where he says, "it never was seen that tithes were demanded of great trees, nor of timber;" which saying of his was within five years of the making of the said statute of 45 Ed. 3. So that he who lived in the time before the act was made, testifies that there never was an instance before the act where tithes had been paid of such great

trees, and the reason thereof is, because they were an inheritance of themselves. And as tithes shall not be paid of the trees themselves, so shall not they be paid of the branches which come of the toppings and toppings of the great trees; for if the tree itself, which is the principal, be excused from paying tithe, so shall the branches thereof, which follow the degree of the principal, be also excused, and especially in this case, because the branches are of the age of 20 years and more, which age makes them to be accounted great trees themselves. And for these reasons it was prayed, that the defendant might be convicted of the contempt.

And the justices did not argue the matter openly, but at last they agreed among themselves, that tithes were due to the defendant in this case, and they granted him a consultation. And because they did not openly declare the reasons of their judgment, I afterwards inquired them of *Wray*, chief justice of *England*, who told me that the reason, upon which he and his companions gave the judgment, was, because the trees are of a base nature, and are not timber, nor can be of any service in building, for they cannot in their nature endure long, but they are only fit for fuel, and other trifling uses, And therefore, if the hornbeams themselves had been cut down, tithes should have been paid for them, and by the same reason they shall be paid for the boughs and branches of them; for the branches, which are of the age of 20 years and more, shall be of the same nature with the trees out of which they spring and grow, and of no other nature. For if the tree itself is privileged from tithes, so shall the germens above 20 years of age which grow from it be privileged, as the germens of that age of oak and ash, and such like, shall be exempt from the payment of tithes as well as the oak or ash itself shall; for he said that a branch above 20 years of age of an oak, or ash, or the like, may be of service in building, and therefore it shall be exempt from tithe, as well as the principal tree shall. But hornbeams shall pay tithes, though they are of the age of 40 or 50 years, as hasels, or sallows, and the like, shall do: and the *great wood* specified in the said statute is to be intended of wood which consists of trees of value, as of oaks, and ashes, and elms, and such like, but not of hornbeams, (a) sallows, hasels, maples, and the like, which in all ages ought to pay tithes, and so shall the branches which sprout from them, of what age soever the same be. And all this he said to me, and for this reason they granted the consultation, as he said.

other timber, and the custom of the country to put these sort of trees to the uses of good timber, may free them, being 20 years' growth or more, from the payment of tithes. *Noy 30, Pinder v. Spencer.* (and see *Walton v. Tryon*, post. 827. *Duke of Chandos v. Talbot*, 2 P. Wms. 606.)

1574.

Anon.

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(a) Wats.
Compl.
Incum.
says that
peradven-
ture the
scarcity of

1575.

Windham

v.

Norris.

Chancery
hath juris-
diction of
tithes.

17 Eliz. A. D. 1575.

Windham against Norris. [Toth. 285. In Ch.]

A DEMURRER, because the matter concerneth tithes, over-ruled and ordered.

E. 18 Eliz. A. D. 1576.

The Parson of *Peykirke's Case.* [Dyer, 349 b.]

Prohibition
lies to a suit
for tithes of
hay and
grain, where
the lands in
the hands of
an abbot
and his far-
mers have
from time
immemor-
ial been
charged
with tithes
of wool and
lambs only.

THE parson of *Peykirke* and *Elmeton* juxta *Peterborough*, of which the abbot of *Peterborough* was patron, and also owner of the manor of *Elmeton*, being a hamlet of that parish, at this day demanded tithe of hay and corn out of the demesnes of *Elmeton* manor, of which the present dean and chapter of *P.* are both patrons and owners; whereas within time whereof memory runneth not to the contrary before the dissolution of the abbey, and at the time of the dissolution, no such tithes, but only other tithes, as of wool and lambs, &c. were paid by the farmers by lease, or at will, being lay persons. Whether a prohibition upon the statute of 31 H. 8. [c. 13.] by virtue of this word *discharged*, will lie or not? And by the opinion of the justices and clerks of *B. R.* prohibitions the this case are common, &c.

M. 18 & 19 Eliz. A. D. 1576.

Grendon v. Bishop of Lincoln. (Plowd. 493.)

The case.
The king
being seised
of an ad-
vowson in
right of his
crown,
grants it by
his letters
patent to
dean and
chapter,
when the
church is
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full, and
that they
may hold
the rectory
of the said
church, im-
mediately
after it be-
comes void,
to their pro-
per use, to
them and
their suc-
cessors for
ever, with-

It appears by the record, that the plaintiff has declared, that king *Edward 6.* was seised of the advowson of the church of *Dean* as of gross by itself, as of fee and right, in right of his crown, and the same being vacant, he presented to it one *William Chamberlain* his clerk, who was admitted, instituted, and inducted: that the king died, and the advowson descended to queen *Mary*, who in the first year of her reign granted it to *George Rotherham* and *Roger Barber*, and to their heirs, who granted it over by deed in the first and second years of *Philip* and *Mary* to *Thomas Grendon*, and to his heirs, who died thereof seised, and the advowson descended to *Roger Grendon* the plaintiff, as his son and heir; and afterwards the church became vacant by the deprivation of the said *Chamberlain*, whereby it belonged to the plaintiff to present, and the defendants disturbed him. To this the bishop pleaded that he claimed nothing but as ordinary. And the dean and chapter said, that long before the said king *Edward 6.* had any thing in the advowson, king *Henry 8.* was seised of the said advowson as of gross by itself, as of fee in right of his crown, and being so seised, he presented one *Edmund Haltman* his clerk, who, on his presentation, was admitted, instituted, and inducted; and the king died seised,

and the advowson descended to the said king *Edward 6.*, and he being seised thereof, the 22d day of *May*, in the first year of his reign, by his letters patent shewn forth, of his certain knowledge and mere motion gave and granted the said advowson to the said dean and chapter, to have and to hold to them and to their successors for ever: and further, the same king of his special grace, certain knowledge, and mere motion, and by his royal authority supreme and ecclesiastical which he then had, for himself and his successors, granted and gave licence to the same dean and chapter, and to their successors, that whensoever by death, resignation, deprivation, or in other manner the said church should be vacant, the same dean and chapter, and their successors, might immediately hold the parsonage of the said church to their proper use, to them and to their successors for ever, without molestation or hindrance of the same king, his heirs and successors, and that without any presentation, induction, or admission of any incumbent to the same parsonage from thenceforth: and further, the same king willed and granted, of his certain knowledge and mere motion, and by his authority aforesaid which he then had, for himself, his heirs and successors, to the same dean and chapter, and to their successors, and to the said cathedral church appropriated, consolidated, united, and incorporated the aforesaid parsonage and church of *Dean*, as it should afterwards happen to be void, as is aforesaid, and all messuages, lands, tenements, glebes, tithes, and hereditaments whatsoever, as well spiritual as temporal, to the same parsonage and church, so as is aforesaid being vacant, in any manner appertaining; to have, hold, enjoy, and convert the same parsonage and church of *Dean*, and all other the premises, to the said dean and chapter, and to their successors, as is aforesaid, to their proper use, without any presentation, nomination, induction, or admission of any incumbent to the same church thenceforth, as by the same letters patent among other things appears: by force of which letters patent, the said dean and chapter were seised of the said advowson as of gross by itself, as of fee, in right of their cathedral church: and they being so seised, the said *Haltman* died the 6th day of *November*, in the 4th year of the reign of the said king *Edward 6.*, by whose death the church became void, whereby the said dean and chapter, immediately after the death of the said *Haltman*, became parsons of the said church, and the said parsonage and church of *Dean* to their proper use held and yet hold, and thereof then immediately and ever since have been and yet are seised in their demesnes as of fee, in right of their cathedral church: and after the death of the said *Edmund Haltman*, the said king *Edward 6.* presented to the said church the said *Chamberlain* as his clerk, which presentation, admission, and institution of the said *Chamber-*

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out presentation, &c. of any incumbent to the same rectory at any time after, and appropriates, consolidates, unites, and incorporates the same rectory and church, and all, &c. belonging to it, to them, and their successors, to hold to their proper use; if this is a good appropriation.

Rast. Entr.
407. b.
N. Bendl.
293. S. C.

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lain thereto specified in the count was void, and of no effect in law, because the said church was then full of the said dean and chapter : and thereupon they demanded judgment. And the plaintiff, as to the bishop's plea, prayed judgment, and had it, but execution thereof to cease until the plea between the plaintiff and the defendants was determined. And as to the plea of the dean and chapter, he demurred in law.

And the matter was argued at the bar and also at the bench in *Michaelmas* term, in which the 18th year of the reign of queen *Elizabeth* ended, and the 19th year of her reign began. And I heard the whole argument of *Dyer*, chief justice, and a great part of the arguments of each of the other justices.

The division
of the
matter.

As to the matter in law, it was digested into divers points. First, what person is capable of an appropriation; secondly, what persons may make an appropriation, and how many ought to assent to it; thirdly, at what time an appropriation may be made, *viz.* if it may be made as well when the church is full as when it is void; fourthly, if a usurpation may be had upon a parson imparsoned, and if by the usurpation of a stranger, the church may be disappropriated; and lastly, if all the things requisite concur in the appropriation here pleaded.

1st Point.

By the
common
law none
but a spir-
itual body
politic or
corporate is
capable of
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an appro-
priation,
and not a
natural per-
son, nor a
layman.

At first ap-
propriations
were made
to sole cor-
porations
spiritual,
who could
administer
the sacra-
ments, and
perform di-
vine service,
as abbots,
priors,
deans, pre-
bendaries,
&c.
Appropri-
ations not

And as to the first point, the justices were of opinion, that none but a spiritual body politic or corporate, which hath succession, is capable of an appropriation. For the effect of an appropriation, as to its original institution, was to make somebody perpetual incumbent, and as such to have the rectory, and the houses, glebe, and tithes which are parcel thereof. And in that he is made parson, he has the cure of the souls of the parishioners, in which case he ought to be a spiritual person: for as a patron ought to present to a church a spiritual and not a temporal person, so for the same reason an appropriation ought to be made to a spiritual and not to a temporal person, for the one has cure of souls as well as the other, and there is no difference between them, but that the one is parson for life, and the other and his successors are parsons for ever; and therefore appropriations were originally made to abbots, priors, deans, prebendaries, and such others who could minister the sacraments and perform divine service, and to none else. And upon this principle it was originally taken, that such parsons imparsoned could not grant over their estates to any other; for at this day an incumbent of a parsonage presentable cannot grant over his incumbency to another, altho' he may make a lease of the glebe and tithes, but he ought to resign, and then the patron and bishop may make a new incumbent, so that the incumbency, which is a spiritual office, cannot be granted over to another; and by the same reason a perpetual incumbent could not originally grant over

to another his estate, which contains the incumbency and the rectory itself, which was the revenue of the incumbent. And upon this ground is the saying of *Herle* in 3 *Ed. 3.* where a *quare impedit* was brought against the prior of *St. John's of Jerusalem in England*, (to whom the possessions of the dissolved order of templars, who had certain parsonages appropriated to them, were conveyed), upon a disturbance to present to a church which was appropriated by the earl of *Richmond* to the said templars; and there *Herle* said, if the templars after the appropriation had granted over their estate of the appropriation to hospitalers, the hospitalers should not thereby have had the appropriation, for it was granted only to the templars, who could not by their deed make an appropriation to others; and he said further, that that which was appropriated to the templars was become disappropriate by the dissolution of their order; wherefore it was thereupon said to the court, that the same estate which the templars had was conveyed to the prior of *St. John's* by the grant of the pope, and of the king, and by parliament. So that by the opinion of *Herle* an appropriation could not be transferred from one to another. And not without great reason; for it contains a perpetual incumbency (which is a spiritual function) appropriated to a certain spiritual person, which could not by law be removed from them to whom the church was first appropriated, by any grant afterwards to be made by them.

And although originally appropriations were only made to such spiritual persons as could minister the sacraments, and perform divine service, as abbots, priors, deans, and such like, yet in process of time they began by degrees to shake off that restraint; and they were afterwards made to others, as to a dean and chapter, (which is a body corporate consisting of many persons, which body together cannot say divine service), and to nuns, (who were prioresses of any nunnery, and could not minister the sacraments, nor say divine service to the parishioners), which was *grande nefas*, as *Dyer* termed it; and this was done under the pretence of maintaining hospitality. And in order to supply these defects in the persons to whom such appropriations were made, who could not themselves perform divine service, a vicar was afterwards devised, who was deputed to priors, or to dean and chapter, and at last to abbots themselves, and to others, to say divine service for them, and he had but a small portion allotted him, and they to whom the appropriations were made retained the great revenue, and did nothing for it, and as the revenue decayed, so did preaching and hospitality in the parsonage, and other good works, which was a great misuse as it seemed to the judges. And all this was done under pretence of hospitality, which in fact was the ruin of hospitality, and especially in the parish, where it should chiefly be kept up.

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*Lincoln.*grantable
over.

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Afterwards
appropri-
ations were
made to
spiritual
corporations
aggregate,
who cannot
all together
say divine
service, as
to a dean
and chapter,
and at last
to nuns.

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Lincoln.

But yet such appropriations were never made but to a spiritual body, which had successors and not heirs, in which succession the patronage, incumbency, and the fruits of the benefice might for ever remain; and a marriage was made between them, (as the lord *Dyer* termed it), so that the one should not be divorced or separated from the other at any time. And in order to perfect such marriage, it was requisite that the patronage, which is another thing than a spiritual body, should be in such spiritual body politick or corporate as should be perpetual incumbent; for the patronage is a thing temporal, to which the incumbency which is a thing spiritual ought to be conjoined, and that cannot be if they are in several hands, for separation and conjunction are directly opposite and contrary to each other. Wherefore a spiritual body politick or corporate, being the patron, is only capable of an appropriation.

2d Point.
Appropriations
ought to be
with the
assent of
the ordi-
nary, the
patron, and
the king.
* [141]

As to the second point, viz. what persons may make an appropriation, and how many in number ought to assent to it; all the justices unanimously agreed that the ordinary, the patron, and the king ought to agree to it, and these are *actores fabulæ*, as *Dyer* termed them. And first the ordinary inferior or supreme ought to agree to it, because he is the principal agent in it, for he has the spiritual jurisdiction, and the act of appropriation is a spiritual thing; and the ordinary says, *appropriamus, consolidamus, et unimus*, as principal actor in the cause, (as *Manwood* justice said), because the cure of the church principally concerns the souls of the parishioners, of whom the bishop hath the charge within his diocese, for which reason the law has attributed to him the principal part in the appropriation. And, it was said, it appears in a case in 6 H. 7. (which then commenced, but was not adjudged until 11 H. 7.) that a union and an appropriation belong to the bishop to do, and where a union was there made of a chapel in one diocese to a college in another diocese, the assent of both the bishops was pleaded, and a great number of cases and precedents in the book of entries were cited, where the bishop of the diocese had made appropriations, (which cases I will not here recite, my intent being only to make a brief report of the matter, *sed summa sequor fastigia rerum.*)

The pope
used to be
looked
upon as su-
preme ordi-
nary, and
made ap-
propriations
without the
bishop, who
was only
deemed in-
ferior ordi-
nary.

And that which the ordinary of the diocese might do, the same was used to be done within the realm by the pope, as supreme ordinary, who claimed to himself a supreme jurisdiction above all ordinaries; and it was long suffered to be done by him, so that he used to make visitations, corrections, dispensations, and tolerations within every diocese of this realm, as the ordinaries use to do, (as *Mounson* said), and he took from the bishops of this realm whatever and as much as he pleased. In consequence of this custom he used to make appropriations without the bishop, which were taken to be

good, and the bishop, who was only looked upon as inferior ordinary, never contradicted or opposed this practice, but it was submitted to and accepted as good; for (as *Manwood* said) *in presentia majoris cessat potentia minoris*. And so an appropriation made by the pope alone, without the ordinary, was taken to be good. And hereupon *Manwood* cited the case in 29 *Ed. 3.* in a *quare impedit* brought by the earl of *Salisbury* against the prior of *Mountague*, where an appropriation was pleaded to be made by the apostle, with the assent of the king, without mention of the ordinary, which appropriation was allowed to be good; and he said that the pope was called by the name of *apostle*. And many other cases were cited to the same purpose. And the pope used to make provisions until he was restrained by the statute of 25 *Ed. 3.* which provision was a designation of the person who should be incumbent, and an admission, institution, and induction of him without going to the bishop. So that his authority was looked upon as absolute, and bound the bishop as his inferior in all his acts. And so it was agreed by the whole court.

And such authority and jurisdiction as the pope used to exercise within this realm was acknowledged by the parliament in 25 *H. 8.* and in other statutes, to be in the said king *Henry 8.*; so that he might lawfully exercise such jurisdiction as the pope used or was accustomed to exercise within this realm. And from him this authority descended to king *Edward 6.* who made the appropriation here, so that he being supreme ordinary might make an appropriation of his own authority and jurisdiction without the bishop, for which purpose he inserted in his charter these words, *by our royal authority supreme and ecclesiastical which we enjoy*. And other like acts of jurisdiction and authority he might do, which the bishop of *Rome* was used to do in this realm. And hereupon *Dyer* said, that in a late case in the common bench between sir *John Pollard* and *Walrond*, he and all his companions declared the law to be, that a resignation which the dean of *Wells* had made to the king was good and effectual, inasmuch as the king was head of the church of *England*, and that it was as good as if it had been made to the bishop, and thereby the deanery became void. Wherefore all the justices agreed that an appropriation made by the king alone without the bishop is as good as if the bishop had made it, or as it was taken in ancient time to be when the pope made it.

But although the ordinary, inferior or superior, is the person who ought to make the appropriation, yet he cannot do this without the will of the patron. For the patron has a temporal inheritance in the advowson, *viz.* a fee-simple, which neither the ordinary, nor in ancient time the pope, could take away from the patron, nor alter without his will and assent. And therefore in all

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The authority which the pope exercised in this realm being acknowledged by parliament to be in the king, consequently he, as supreme ordinary, may make an appropriation of his own authority without the bishop, where he himself is patron.

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appropriations the patron is a party, for he ought to accept it; and the ordinary is the agent, and the patron is the patient, and his assent in submitting himself to the will of the ordinary, and in accepting his order, and in executing that which he ordains, is a declaration of his will, and the whole shall be intended to be done at his request, for the benefice is his own. So that the ordinary and the patron are two actors in this drama.

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But besides these there is a third who has a part to act herein, and that is, the king, as king, for he might be hurt by this marriage or appropriation, because the advowson is held of him mediately or immediately. And if it is held of him immediately, then all possibility of having any advantage of wardship, relief, or the like, accruing from the tenure, is taken away by this conjunction; for then it cannot be expected that the patronage will ever come again into lay-hands, or that the king, who had the patronage, if he was the founder of the abbey, priory, or other spiritual place, shall in any mean vacation have the presentment. And if the advowson is held immediately of a subject, yet it is held mediately of the king, for all lands within this realm are held either mediately or immediately of the king, and before the church was built the land upon which it stands was held of the king, and so shall the advowson be held of him, which is reposed in the patron in lieu of the land upon which the church is built, and this patronage may possibly come to the king by escheat or otherwise, and if it does not, yet the king may have the benefit of it by lapse. For if the patron does not present within six months, then the ordinary may present within the next six months, because it is his duty to see that the parishioners have divine service performed; and if he does not present within these six months, then the metropolitan may present within six months next after, in respect that it lies upon him to see that the parishioners have divine service; if the ordinary is remiss in providing it, and if the metropolitan does not present within these six months, then the king may present when he pleases, for in respect that the land is held of him, the presentment accrues to him by lapse, for default of the other three, as supreme patron (as *Dyer* called him, and *Harper* and the other justices called him supreme patron as king, and not in respect of the supreme jurisdiction which the realm had acknowledged in him by the statute, with reference to that which was before exercised by the pope). And all this benefit which might accrue to the king from the advowson is lost by the appropriation, because it will never come out of the hands of the incumbent again, so that the king can never have any hopes of presenting an incumbent by lapse or otherwise. And therefore in respect of the loss which the king sustains by an appropriation, the law has given him a prerog-

gative that he shall be privy and shall give his consent to every appropriation, as well where the church is of the patronage of another, as where it is of his own patronage. So that the king is the third actor in this drama.

[But *quære*, if the appropriation be made without the king's assent, what damage the parson imparsoner shall sustain by it. For the appropriation is not mortmain, as it appears in 21 *Ed.* 3. 5. in a *quare impedit*, where the lord of whom an advowson was held brought a *quare impedit* upon an avoidance, and took his title upon an entry for an appropriation as for mortmain, and there it was said against him, that the lord had no damage by the appropriation, for the advowson was held of him afterwards as well as before, and the appropriator purchased no lay-fee nor thing temporal, but tithes, and oblations, and things spiritual, so that the case was not within the statute of mortmain; and there the justices were of opinion to give judgment against the plaintiff, for which reason he was nonsuited. So that it appears from this case, that an appropriation is not mortmain. But in *P.* 19 *Ed.* 3. the king brought a *quare impedit* against the prior of *Bentsey*, and counted that the prior held the advowson of the king as of his crown, and presented, and afterwards without his license appropriated it, whereby the right of the advowson by the law of the land accrued to the king: and the prior pleaded that the king by his charter there shewn forth gave him license to appropriate it, and he said that the advowson was held of one *W.* And it was there held by *Stone*, that if the advowson was holden of the king as of his crown, or as an escheat, the charter which did not make mention of the tenure should be void, and that the king should not be foreclosed of his presentment: and afterwards they were at issue, whether the advowson was holden of the king, or not. By the purport of which case, and by the said words (that the right of the advowson by the law of the land accrue to the king), and also by the words of *Stone* (that the king should not be foreclosed of his presentment), it seems that they took the law to be, that for such offence, *viz.* for an appropriation without the king's license, the king should present. But what estate the king shall have in the advowson is not there expressed. And inasmuch as it is not mortmain, I do not see that the king can have any estate of inheritance or freehold, or that he can have more when it is held of him immediately than when it is held of a subject; for the advowson remains as it was before, and there is no transmutation of the possession, nor any subtraction of the services of the tenure, nor any damage in the one case more than in the other, but the king shall have as great an estate in the one case as he shall have in the other, and the offence to the prerogative is the same in the

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Where an advowson (whether held of the king or of a [144] common person) is appropriated without the king's licence, the advowson is not thereby forfeited, but the king may seize it, and present to the avoidances in the name of distress until a fine is made to him; and he shall not have an estate of inheritance or freehold in the advowson, for the appropriation without licence is not mortmain.

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one case as it is in the other. And it seems to me that the advowson shall not be forfeited to the king either in the one case or in the other; but I am of opinion with *Shard*, in the case of 21 *Ed. 3.* above cited, where, upon *Wilby's* saying that if the advowson had been held of the king, and it had been appropriated without his license, although another had been the founder, the king might have seized the advowson, and yet it was a damage to none; to that *Shard* replied, "What you say is the king's prerogative, and has always been adjudged as well touching advowsons which are not held of him, as touching those which are held of him, for he who appropriates a church ought to have the king's license; but if the king in such case seizes the advowson, it is not forfeited, but he shall present to the avoidances in the name of distress, until a fine be made to him for making the appropriation without license." These are the words of *Shard*, which I thought proper to cite at large, and the more so because I did not hear the judges speak to this matter.]

And so all the justices unanimously agreed, that the ordinary inferior or superior, the patron, and the king, ought to assent to every appropriation.

3d Point.
The most proper time for making an appropriation is when the church is void, yet it may be made when the church is full, by such apt words as will serve to appropriate it when it becomes void.

As to the third point, *viz.* at what time an appropriation may be made, that is, if it may be made when the church is full; as to this, all the justices unanimously agreed that an appropriation may be made by apt words when a church is full, that is to say, by words which serve to appropriate it afterwards when it shall be void. For the most proper time to make an appropriation is, when the church is void, because then the appropriation may be executed presently. But if the church is full, then if proper words are used; as, that the patron, who is a spiritual person, after the church shall be void, shall be parson, and may retain the glebe and the fruits to his own proper use; this shall make a good appropriation when the present incumbent is dead, or an avoidance happens. So that the effect of the words shall be there executed afterwards when the church is void. And the reason whereupon some have heretofore doubted of this, is, because the present incumbent has a fee-simple in the mansion, and in the glebe, and in the tithes, and there is no reversion or interest in any other besides the incumbent, when there is an incumbent. In which case it has been said, that the ordinary, and the patron, and the king, cannot grant to a stranger that he shall retain in time to come the glebe and tithes, in which they have then no estate or interest, but which another is seised of in fee, and that they cannot unite, annex, or consolidate to the patron and his successors the rectory in which they have no estate. But as to this, true it is that neither the patron, nor the ordinary, nor the king, have any estate in the

parsonage, but the whole estate and inheritance thereof is in the incumbent, and therefore neither the patron, nor the ordinary, nor the king, have any thing to do with it in the life of the incumbent: but the matter rests upon another point; for although they have nothing to do with the parsonage, yet the ordinary, inferior, or superior, may, with the assent of the patron and of the king, assign the patron, being a spiritual body, to be incumbent when the present incumbent shall be dead, or an avoidance happens. And in this case there is a diversity between the presentation of an incumbent by the patron, and this assignation of an incumbent by the ordinary. For while the church is full, the patron cannot present one to the bishop to be incumbent when the church shall be void, but he ought to wait until the church is void, and before the avoidance happens he has no title to present, nor is the ordinary bound to accept the person presented to be parson at a time to come, but such presentation shall be void. But the ordinary, with the assent of the patron and of the king, may assign the patron, being a spiritual body, to be incumbent when the present incumbent shall die, or an avoidance happen, for this is prejudicial to none, and the person assigned may be so fit for it that it may be beneficial to the church and to religion. And upon this reason the pope, before he was prohibited by the act of 25 Ed. 3. used to make provisions to the benefices of other patrons, and especially to the benefices which the clergy had, which, although injurious to the patrons, yet such provision as to incumbents was undoubtedly allowed in the law as good, and such provision was nothing more than a designation of one to be an incumbent after the present incumbent should be dead, or an avoidance should happen, and that such person assigned might enter into the rectory, and retain the profits during his life without admission, institution, and induction. And if the pope could do so in such case where it was injurious to the patron, and the clerk so appointed was, after the death of the incumbent, adjudged in law a sufficient incumbent, without admission, institution, or induction; *a fortiori*, he might have done this to the patron himself, in which case no injury would have been done to the patron, and such patron should have been adjudged incumbent without any other admission or institution, and might have entered without induction. And if the pope used to do this, then the king, in whom such power as the pope exercised is acknowledged by parliament to be, may do it; and then if the spiritual body so assigned shall be adjudged incumbent without other admission or institution, and shall thereby have the spiritual function, and the parson in deed, then he may enter into the rectory, because the king, who has sufficient authority to enable him so to do, has dispensed with the induction. So that when he is

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Diversity between an appointment of a perpetual incumbent (by way of appropriation) by the ordinary with the assent of the patron and of the king, when the church is full, and the presentation of an incumbent by the patron when the church is full.

An appropriation made when the church is full is not precisely a grant of the glebe and tithes, but an appointment of a spiritual body to be incumbent when the present incumbent [147] shall die, or an avoidance happen, and in such case

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the spiritual body being appointed to the function, and made parson, has thereby in him the right of the possessions, and may enter into the parsonage, after the death of the present incumbent or at an avoidance without admission, institution, or induction.

appointed to have the spiritual function, and to be parson, he is thereby made owner of the possessions of the parson: for as he who is made abbot has thereby the possessions of the abbey, so he who is duly made parson is implicatively made possessor of the parsonage; for the spiritual office draws with it the right to have the possessions belonging to the office. Wherefore the making of a spiritual body to be perpetual parson when the church is full, is not precisely a grant of the glebe and tithes, but in that such body is made parson, he may, after the death of the present incumbent, or when an avoidance happens, meddle with the glebe and tithes as things annexed to his office of parson. So that the reason before mentioned, which has inclined some to think that an appropriation cannot be made when the church is full, is of no weight, but falls to the ground. And all the justices agreed that an appropriation may be made in the life of the incumbent, with apt words which will serve to appropriate it at the time when an avoidance happens, at which time it will be a good appropriation. And *Manwood* justice said, that in 6 H. 7. *Keeble*, who argued that an appropriation could not be made in the life of a present incumbent, admitted that an appropriation might be made after his death, as well as a union, but then there must be other words; which words intended by him (*Manwood* said) are words *in futuro*, viz. that he shall be parson from the time of the death or avoidance of the present incumbent.

[It seems to me in this case, that if the dean and chapter, after the letters patent made, and in the life of *Haltman*, had made a lease for years of the rectory, the lease should have been void, because in the life of *Haltman* they had nothing in the rectory, and the appropriation was not executed until after the avoidance, at which time by their entry they had an estate in the rectory, and not before.]

4th Point.

No disappropria-
tion of a church
by usurpa-
tion upon
the parson
imparsonnee.

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As to the fourth point, viz. whether a usurpation may be made upon a parson imparsonnee, all the justices unanimously agreed that it cannot, because the church has an incumbent, and is full; for he to whom the appropriation is made is incumbent, and as complete a one as any other incumbent should be, who came in by presentment, institution, and induction; and then there cannot be two incumbents of one and the same church at one and the same time, for to be incumbent is the office of one body; and if there is one incumbent, and another is presented, admitted, instituted, and inducted, all this is void. As, if *A.* is an officer of an office for life, as steward of a manor, or the like, a patent made to *B.* of the same office during the life of *A.* is void, and if *B.* is admitted, instituted, and inducted, *A.* shall have an action of trespass against him. So, if a parson imparsonnee has a church appropriated to him

and another is presented, instituted, and inducted into the same church, he shall have an action of trespass against him, if he meddles with the glebe and tithes, as it is agreed by all the justices in 38 *H. 6.* And the like case was cited in 39 *H. 6.* where a prior was parson imparsonnee, and a stranger presented his clerk, who was admitted, instituted, and inducted, and in by six months, and made a lease of the parsonage, and the lessee ousted the prior, and the prior brought an action of trespass, and the matter was there well debated, and it was the opinion of the whole court that the action of the prior was maintainable; for when the church was full of the prior, the presentation, institution, and induction of the other did not oust the prior, but was void, because the prior shall be adjudged always in possession, and therefore he could not have had a writ of right of advowson, for none shall have that writ but he who is out of possession, for which reason his action of trespass or assize should lie. But a parson imparsonnee cannot, in a *quare impedit* brought against him, plead plenarty (as *Manwood* said,) because the statute of *Westminster 2. cap. 5.* gives such plea to the patron, *viz.* that the church is full of his own presentation by six months before the writ purchased, which a parson imparsonnee cannot say; and that statute destroys the pleading of plenarty at the common law, which was, that the church was full the day of the writ purchased, as it is said in the said case of 38 *H. 6.* wherefore a usurpation cannot be made upon a parson imparsonnee, nor can the church be disappropriated by such means.

But, if a parson imparsonnee presents another, thereby he has disappropriated the advowson, and made it presentable ever after, as *Manwood* said; for, he said, *volenti non fit injuria*, but against his will no one can tortiously disappropriate it. And if a corporation, to which a church is appropriated, is dissolved, the church is thereby disappropriated, (as the lord *Dyer* said,) and the lord of whom the advowson is held may present to it.

[*Quere*, If dean and chapter, or other spiritual corporation, is seised of a manor to which an advowson is appendant, and the church is appropriated to them, and afterwards they make a feoffment or a lease of the manor *cum pertinentiis*, shall this disappropriate the church? For it seems to some, that by the course of the common law the advowson shall pass as appendant to the manor; but now by the statutes, which have made the king and lay persons capable of parsonages appropriate, the advowson is in such case severed from the manor by the intent of the acts, and in the grant of the parsonage appropriate, which may now be granted and transferred to common persons, the advowson shall pass.]

So it was held by all the justices that no usurpation can be made upon a parson imparsonnee, as it is said before.

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5th Point.
If there is
every thing
requisite to
make the
appropri-
ation here
good.

And as to the last point, *viz.* if there are all the necessary ingredients in the appropriation here pleaded. And the three *puisne* judges, *viz.* *Mounson*, *Manwood*, and *Harper*, held that there were, and that the words of the charter of king *Edward 6.* are sufficient to convey the advowson to the dean and chapter, and to make the appropriation, and that the said king's charter serves for three purposes, *viz.* to convey the advowson to the dean and chapter, and to make the appropriation as supreme ordinary with his ecclesiastical jurisdiction, and also to give his assent as king of this realm, and that the church was full of the dean and chapter immediately after the death of *Haltman*, and that the presentation, institution, and induction of *Chamberlain* was void, and that upon the whole matter the plaintiff ought to be barred. But as to the lord *Dyer*, altho' he agreed with them in the first four points, yet in this last he varied from them, and he took four exceptions to the matter and the form contained in the bar.

Exceptions
taken by
Dyer C. J.
to the mat-
ter of the
bar.

The first was, because in the grant of the advowson to the dean and chapter, and to their successors, there is not the clause of *non obstante* the statutes of mortmain; for the king's grant ought not to be taken to two intents, *viz.* to convey the advowson to the corporation, and also to dispense with the statutes of mortmain. And hereupon he cited the case in 9 *Ed. 4.* in an assize between *Bagot* and *Swiringdon*, where the king granted an office for life to an alien; and it was there taken that the grant was not good, because no mention was made in the charter that the grantee was an alien, and forasmuch as the grant could not enure to two intents, *viz.* to make him a denizen, and also to convey to him the office, the charter was held to be void; wherefore the party, in order to enable himself to have the office, shewed the letters of naturalization.

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Excep-
tion 2.

The second exception was, that the charter is not sufficient to make an appropriation, because it has not made the dean and chapter parsons of the church. And the charter ought to have granted, that after the avoidance of the present incumbent they should be parsons, for the words of uniting and incorporating the parsonage to them and to their successors, and of enabling them to enter into the parsonage, extend only to the rectory in which the king and patron had nothing, and therefore he had no authority over it, and consequently the grant is void for that reason. But the effectual words to make the appropriation in this case are words which constitute them parsons after the avoidance of the present incumbent, which words are omitted. For if a writ of annuity had been brought by the dean and chapter, after the death of the then present incumbent, for an annuity due in respect of the parsonage, or if a writ of annuity had been brought against them for an an-

nuity which was payable for the parsonage, in both these cases they ought to have been named parsons. And this appears in the first case in 21 H. 7. as well as in divers other books which he cited. And he also cited the case in 12 H. 4. in an assize, where the prior of *Burton* brought an assize for certain wheat taken, &c. and the tenant pleaded *out of his fee*, &c. and the plaintiff said that he and all his predecessors, parsons of the church of *Pederton*, had been seised from time immemorial, &c. and it was the opinion of the justices that the writ should abate, because he was parson, and claimed as parson, and was not named parson. And he cited divers other cases to the same effect. So that he said, to be parson is the chief point of an appropriation, and therefore the want of words to make them so here renders the appropriation insufficient.

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The third exception was, for that the defendants have not alleged that they entered after the death of *Haltman*. For the words of the charter are, that after the avoidance *they should and might hold*, &c. in which case power and liberty is given them to hold, and they have not shewn that they did enter or hold, for in things of election the party ought to shew that he has done it. And because the defendants have not alleged an entry, the appropriation is not shewn to be executed, and therefore the plea in bar is insufficient.

Excep-
tion 3.

The fourth exception was, for that the defendants have pleaded that after the death of *Haltman* they were parsons, and held and yet do hold the aforesaid rectory and church to their own uses, and thereof then and always afterwards have been seised in right of their cathedral church aforesaid; whereas they ought to have said, *in right of the church of Dean*, for they hold the parsonage in right of the church of *Dean*, and not in right of the cathedral church of *Worcester*, as it is shewn before; so that this is not well pleaded, but vitiates the plea.

Excep-
tion 4.

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But the lord *Dyer* was the last who argued, and there was none to reply to him as to these exceptions; and therefore one of the defendant's counsel, who heard the exceptions, put in writing such answer to them as occurred to him, and delivered it to the lord *Dyer*, which was also seen by the other justices. And the answer was thus, *viz.* as to the first exception, touching a *non obstante* the statutes of mortmain, the grant is good notwithstanding there is not any licence to alien in mortmain, nor any clause of *non obstante* in the patent, and that as well in the case of a grant by the king, as by a common person, and it shall vest in the grantees, else it would not be mortmain. But the penalty is, that the lord immediate may enter within the year, and the other lords within half a year after the time devolves to them, and (if the thing does

Answer to
the 1st ex-
ception
taken by
Dyer C. J.
The king
may dis-
pense with
the statutes
of mortmain
without any
clause of
*non ob-
stante.*

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not lie in tenure) the king shall have it after office found, and until office is found it is in the corporation. And so in this case if the clause of *non obstante* was necessary, the king might have a *scire facias* after office found, and by that means he might reseise the advowson. But the grant was a grant and passed at one time, so that the patent is not void. And if in fact the dean and chapter had a sealed licence of the king to purchase this advowson of the king, this licence and the grant afterwards by another charter were good, notwithstanding there was no clause of *non obstante* in the charter of the grant of the advowson; and there might be such licence in this case, and it is not necessary to plead the licence upon the grant, but when the party is empleaded by *scire facias* after office finding the mortmain, then is the time to shew it. And in *Fitzherbert, tit. Fines*, we may frequently see fines levied to corporations without shewing any licence; but if after the fine the corporation is impeached for the mortmain, then is the time to shew the licence, and not in pleading or in setting forth the title. And in *rei veritate* there is a clause of *non obstante* in the patent here, although it is not pleaded.

[152] And it seems that though the dean and chapter had not had any licence to purchase this in mortmain, nor any clause of *non obstante* in the patent, yet the patent should have been good, for it cannot be presumed that the king is ignorant of his law, because he is the head of it; and therefore when he granted the advowson here, and said, *of his certain knowledge, &c.* it is to be supposed that he was desirous that the defendants should have the advowson, notwithstanding his statute of mortmain, whereof it is to be intended that he takes cognizance by the words, *of his certain knowledge, &c.* so that the grant countervails in itself a grant and a clause of *non obstante*.

And where it is said by the lord *Dyer*, that the king's grant cannot enure to two intents, true it is, where the one intent is to be taken of a foreign matter; as, if the king grants land to *A.* and his heirs, and *A.* is his villain, this grant shall not enure to give the land to the villain, and also to manumise him, because his being the king's villain was a foreign matter, and in fact not apparent to the king; but yet the patent is good to the villain, and the land is vested in him, though upon an office finding that he is a villain, the king may enter into the land as well as if any other had given it to his villain; and in this case the land passed from the king, although the patent did not manumise the villain. But in the principal case there is no such foreign matter in deed not apparent to the king, which the king might be said not to have cognizance of, for the king was well apprised that the dean and chapter were a corporation, and that his statute of mortmain ex-

tended to them, which statute he could not be ignorant of, but on the contrary he had knowledge of it, as his words, *of his certain knowledge*, testify. So that here there is no ignorance in fact, as in the cases of a villain, and of an alien; but if there is any ignorance at all, it is an ignorance in law, which cannot be allowed in the king in this case.

Yet in some cases it is necessary to have the clause of *non obstante* in the king's grants. As in the case of 2 H. 7. Fitz. tit. Grant, pl. 33. it was ordained by statute that the grant of the king to any one to be sheriff of any county for a greater time than one year should be void, notwithstanding the clause of *non obstante* should be in the patent; and there it was taken that the grant of the king made to the earl of Northumberland to be sheriff during his life ought to have a clause of *non obstante*, &c. because the statute is strictly penned *ut supra*, and the patent made to the earl in that case was good with the clause of *non obstante*, &c. So, if the king will grant to one to be escheator for life, there ought to be the clause of *non obstante*, because the statute has precise words to make void such grants. And in a pardon of murder, if the king expresses that the party shall not find surety for his good behaviour, as the statute of 10 Ed. 3. requires, there ought to be a clause of *non obstante*, &c. in the charter, because the statute expressly makes such pardon void, if such surety is not found afterwards. So that to avoid the precise words of the act, it is necessary to have the clause of *non obstante*, &c. But in the statute of mortmain there are no precise words to make the grant void, but the act gives an entry or seizure, as the case requires, always admitting the grant to be good. And here it appears to be the intent of the king that the dean and chapter should enjoy this without seizure, as it is said before; and the words, *of his certain knowledge*, shew that he took upon himself cognisance of all things requisite, and, consequently, of the statute of mortmain.

As to the second exception, *viz.* that the charter has not expressly made them parsons; to this the said counsel wrote an answer, that the words which enable the dean and chapter to hold to their own use, without presentation, admission, or induction, and the words of the grant by which the king appropriates, consolidates, unites, and incorporates the church and the rectory to the dean and chapter, and to their successors, import that they shall be perpetual parsons, and in a manner make them parsons, and are equivalent to words which make them parsons, and are usual in appropriations without other words to make them parsons, as appeared by the precedents shewn to the lord Dyer with that which is here written. And these words, together with the words, *of his special grace, and mere motion*, &c. are to be so applied that some-

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Answer to
the 2d ex-
ception.
These words
by periphrasis
amount
to the same
as if they
were ex-
pressly
made par-
sons.

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Lincoln.*Answer to
the 3d ex-
ception.

thing shall be made of them rather than they shall be void. And the king's intent ought not to be utterly subverted.

As to the third exception, *viz.* that the defendants have not shewn that they entered after the death of the incumbent; to this the said counsel wrote in answer, that the patent made the dean and chapter parsons immediately after the death of *Haltman*, without presentation, admission, and institution, and then if the words shall take such effect, the grant is as fully executed as if all these three things were executed in a common incumbent, and especially as to the admission and institution, by which words they were made fully parsons, and had the spiritual function at the instant of the incumbent's death, and the cure of souls. And as to the induction which gives seisin of the possessions, that was dispensed with by the patent; wherefore the dean and chapter are in the same case as they should be by admission, institution, and induction. And though it should be admitted that the words of dispensing with induction are not equivalent to an induction which gains the seisin, yet the words of the plea in bar are, that after the death of the incumbent *the aforesaid dean and chapter were parsons of the same church, and the aforesaid rectory and church to their own proper uses held and yet hold, and thereof then immediately and always afterwards have been and yet are seised in their demesne as of fee; which words (that they were seised) imply an entry, for without entry they could not be seised, and it is not the practice in the common bench in like cases of possessions executory to allege an entry. For upon a fine sur grant et render the pleading is, by force whereof he (the party to whom the render was made) was seised, without saying that he entered and was seised. And in an ejectione firmæ the plaintiff usually shews the lease made, and says, by force whereof he was possessed, and does not shew any entry; and it is good, because a man cannot be seised or possessed of land unless he first enters; and therefore when he shews the seisin, it is as much as if he had said that he entered and was possessed or seised. And so it shall be in the principal case here.*

Answer to
the 4th ex-
ception.

As to the fourth exception, *viz.* that the defendants have said that they were seised in right of their cathedral church; to this the said counsel wrote in answer, that the plea is, that after the death of *Haltman* they were seised of the rectory and church of *Dean*, in their demesne as of fee, *in right of their cathederal church aforesaid, &c.* which is true, and well pleaded. For there is a difference when the plea is of the whole, and when of parcel. For if they were disseised of an acre parcel of the parsonage, there, if they said that they entered and were thereof seised, they ought to say, *in right of their church of Dean.* And so in the *Register* in a *juris utrum* brought by *L. bishop of Lincoln* parson of the church

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of *E.* the words of the writ are, *whether 20 acres of land with the appurtenances in E. are frank-almoyn belonging to the church of the said L. or lay-fee, &c.* So in 49 H. 6. 16. where the abbot of *Colchester*, parson of a church, claimed an annuity which was belonging to the said rectory, it was taken that he ought to prescribe in right of the rectory, and not that he and his predecessors abbots have had it from time immemorial; for of parcels and things belonging to the rectory, they ought to be claimed in right of the rectory. But here the parsonage and church of *Dean* is an entire thing, of which entirely the dean and chapter have alleged that they were seised in right of their cathedral church; and so in truth they are, and it would be very absurd for them to say that they were seised of the church of *Dean* in right of the church of *Dean*, or of the rectory and church of *Dean* in right of the church of *Dean*. Wherefore there is an apparent diversity between the cases.

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Besides, if the words *in right of their cathedral church aforesaid, &c.* had been totally omitted, the plea would not have been bad; and then the mis-recital of that which might have been wholly omitted cannot vitiate the plea.

And afterwards judgment was given for the defendants, and against the plaintiff.

See N.
Bendl. 296.
S. C. says

that no judgment was here given, but that the parties compromised the matter upon the payment of a sum of money awarded to the plaintiff.

P. 23 Eliz. A.D. 1581. In Cam. Scac.

Flemyng, and the Tenants of *Dudley*. [Sav. 13.]

It was holden between *Flemyng* and the tenants of *Dudley*, that if the tenants, from time whereof memory does not run, &c. have been used to pay a certain price for a tithe lamb, so that the custom is fully established, that although afterwards the parson encroaches upon more, or the tenant pays the lamb in *kind*, this does not destroy the custom. But, if one had paid a penny for a lamb for fifty years; and afterwards pays tithe in *kind*, before the custom is established; although he again pays his penny for twenty years, they cannot prescribe in *modo decimandi*.

When you may or may not prescribe in *modo decimandi*.

T. 24 Eliz. A.D. 1582. In Cam. Scac.

Mayne against *Becke*. [Sav. 30.]

ONE *Mayne* sued *Becke* in the spiritual court for tithes of the manor of *B.* in the county of *Bucks*; and *Becke* exhibited an *English* bill, setting forth, that he was tenant for years on the demise of the queen, and alleged that the said manor was discharged from tithes, and prayed a prohibition, which was granted; and after-

Sequestration to set out tithes never seen.

1582. wards the same *Mayne* came, and prayed sequestration of the tithes of the said manor.

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Manwood. Had the contention been between the parties to whom the tithes of the manor, severed from the ninth part, belonged, your request had been reasonable; but to grant a sequestration for the setting out of the tithes, was never hitherto seen; and if the defendant agrees to this, he admits that the lands are titheable. *Shute* agreed.

T. 26 Eliz. A.D. 1584. In Scac.

[Sav. 60.]

Where the parish is not certainly known, and where there has been no usage of payment, the tithes shall be paid to the parson, or vicar, of the parish where the owner resides.

THERE is a fen called *Wildmore*, in the county of *Lincoln*, which fen is not known to lie in any particular parish; whereupon it was ordered in this court, that the tithes in this case should be paid to the parson, vicar, pensionary, &c. where the owner of the cattle lives. But, if the tithes have been paid to the parson of any parish, beyond time of memory, although it be not known in which parish the moor or common is, they shall be continued to be paid in the said parish, where they have been used to be paid; but where no usage of payment hath been heretofore, nor the parish certainly known, they shall be paid to the parson or vicar where the owner resides, by virtue of a proviso in the statute passed in 2 & 3 *Edw. 6.* chap. 13.

M. 27 & 28 Eliz. A.D. 1585. C. B.

Branche's Case. [Moore 219.]

Unity of possession by a religious parson of the manor and parsonage, is no discharge for the copyholders.

A PROHIBITION was granted out of the common pleas against the ordinary of *Gloucester* and one *Branche*. The surmise was, that the land from which the tithes are demanded, is copyhold, parcel of a manor whereof a prior was seised in fee, and was also parson imparsonnee, by which union the tithes are extinguished. And *Snag* serjeant moved, that the surmise was not good, for the union was no discharge of the tithes of the copyholders, and therefore he prayed a consultation, and had it. For the court said, that there is no prescription alleged in the surmise to be discharged of tithes: and in truth, if an abbot or prior be seised of land discharged of tithes, the new farmer of that land shall be admitted to prescribe in a *non decimando*, by the statute of 2 *E. 6.* which wills that no one shall pay tithes otherwise than they were paid forty years before: but in no other case shall a man prescribe in *non decimando*, but only in *modo decimandi*. (a)

(a) See *Benton v. Trot. Moore*, 528. post. 208.

M. 29 & 30 Eliz. A.D. 1588. B. R.

1588.

Savell v. Wood. [Cro. Eliz. 71.]*Savell*
v.
Wood.

PROHIBITION against a parson who sued for tithes in the spiritual court: the defendant surmised that the clerk of the said parish, and all his predecessors assistants to the minister there *divina celebranti*, had used to have five shillings of him, &c. for the tithes of the place, where, &c. *Coke* said this prescription is void; for it is in one person onely that hath no perpetuity, but is dative and removable, 32 H. 6. 5. And if it be a good surmise, yet there is no cause but a consultation shall be awarded, for it is to come in question in the spiritual court, whether the parson or the clerk hath right to the tithe. And he said it was lately adjudged in *Bush* and *Hunt's* case, where the vicar sued for tithes, and a prohibition was prayed upon surmise that he had used time out of mind to pay the tithes to the parson, that it was not a sufficient surmise for a prohibition to entitle another to the tithes, for that shall come in question in the court christian. *Note*, Afterwards *Hill*. 30 Eliz. it was moved again by *Gawdy* and *Fleetwood* serjeants for the plaintiff, that it was a good prescription, because the parsonage was a parsonage impropriate, and by intendment it commenced by the act of the parson, viz. that he made a composition that the tithe of that land should be paid to the clerk in discharge of himself, and that he had used time out of mind, &c. to pay to the clerk five shillings in discharge of all tithes, &c. And the court said, if this special matter be shewn in the surmise, perhaps it might be good by reason of the continuance, and that by this the parson is discharged from finding the clerk, with which *peradventure* he shall be charged, and so is as a payment of tithes to the parson himself; but such matter is not shewn, and by common intendment tithes are not to be paid to the parish clerk, and he is no party in whom a prescription can be alleged. And thereupon they awarded a consultation. (a)

Payment of money to a parish clerk time out of minde, no good plea in discharge of tithes.

Moore 908.
1 Leon. 94.
S. C.

P. 30 Eliz. A.D. 1588. B. R.

[158]

Stebbs v. Goodlock. [Moore 913.]

In the queen's bench, between *Stebbs* and *Goodlock* parson of *Letcombe*, in the county of *Berks*, a custom was alleged, that the parson was to have every tenth land for the tithe of corn, beginning from such land as is next the church: whereupon the occupiers of the land knowing beforehand what land would be the parson's, by

Fraud upon a customary payment is remediable at common law, and is no ground

(a) See *Scory v. Baber*, post. p. 163. 1 Roll. *Portinger v. Johnson*, post. 286. Abr. 649. pl. 50. — *v. Barnes*, post. p. 285.

1588.

Steb
v.
Goodlock.

for a demand of
tithes in
kind in the
spiritual
court.

covin and in order to defraud him, did not till, nor sow, nor manure his land, as they did their own; by reason of which covin the parson sued in the spiritual court for tithes in kind, that is, the tenth cock of all the corn. And a prohibition was awarded notwithstanding the covin, because the fraud is remediable in an action upon the case at common law.

Tr. 30 Eliz. A. D. 1588. In Cam. Scac.

Grymes and others, v. Smith. [12 Co. 4.]

Endowment is to
be presumed when a
vicarage hath long
continued.

THE case was as follows: The abbot of *Sulby* held the parsonage of *Lubbenham*, in the county of *Leicester*, appropriate, which, as a parsonage impropriate, came to king *H. 8.* by the dissolution of monasteries, *anno 31 H. 8.* who, in the 37th year of his reign, granted it in fee farm, under which grant the plaintiff claims: the defendant had obtained a presentation of the queen, and, to destroy the said impropriation, shewed the original instrument of it, *anno 22 Ed. 4.* with condition that a vicarage should be competently endowed, and alleged, that such vicarage was never endowed, and that, for that very cause, the impropriation was void. In truth, there was no instrument, nor direct proof of any endowment of the vicarage. But as the said rectory was, during all the time of the impropriation, supposed, reputed, and taken to be appropriate; and by all that time a vicar had been presented, admitted, instituted, and inducted, as a vicar rightfully endowed, and had paid his first fruits and tenths; it was resolved, that it shall be presumed in respect of continuance, that the vicarage was lawfully endowed, for that *omnia præsumuntur solenniter esse acta.* And it would be a dangerous precedent to examine the originals of impropriations of any parsonages, and the endowments of vicarages, for that the originals of them in time will perish. And so it was decreed for the plaintiff.

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[As this is a leading case upon this point, I have subjoined the original decree from the record in the exchequer.]

20 June, 30 Eliz. Upon hearing the matter between *Thomas Grymes* and *Jane Grymes*, widow, plaintiffs, and *Henry Smith*, defendant, being for and concerning the right and possession of the parsonage of *Lubbenham*, in the county of *Leicester*, it was affirmed by the plaintiffs, that the said rectory and parsonage was lawfully appropriated to the abbot of *Sulbey*, in the county of *Northampton*, of which the said abbot, long time before the dissolution thereof, was seised in his demesne as of fee in the right of his monastery, and had the same in proper use till the dissolution of the monastery; by force whereof, and the statute for dissolution of monaste-

ries, made in the 31st year of the reign of the late king *Henry* the 8th, the same came to the hands and possession of the said late king; who being thereof seised, and holding the same in proper use, granted the same, in the 37th year of his reign, to one *Richard Grymes* and his heirs, to hold of him, his heirs and successors, by knight's service *in capite*, and by the rent of 37s. a year; and that by divers mesne conveyances, two parts of the said rectory were assured unto one *Thomas Grymes*, father of the said *Thomas*, one of the now complainants, and to the heirs of his body lawfully begotten: and a third part thereof to the said *Thomas*, the father, and the said *Jane*, one other of the complainants, and the heirs of the body of the said *Thomas* the father; and that the said *Thomas* the father died seised thereof, and the said *Jane* survived, and by force thereof the said *Jane* and *Thomas*, the now plaintiffs, were seised of the said rectory, *viz.* the said *Thomas* the son, being within age, and yet in ward to the queen's highness, of two parts of the said rectory, and the said *Jane* of a third part thereof, with divers remainders over as is aforesaid; and the said defendant having pretended that the said rectory was presentable by her majesty, and upon such suggestion thereof to her highness, of late having obtained from her highness, under the great seal of *England*, a presentation to the said rectory, hath frequently sought before this time, and yet doth, to be admitted, instituted, and inducted into the same; whereupon the state of the cause in question appearing to the court to depend on this fact, whether the said rectory were lawfully appropriate, or elsewhere presentable, the said plaintiffs' counsel shewed forth to the court an instrument of appropriation of the said rectory of *Lubbenham*, establishing a perpetual vicar there, made in the 22d year of the reign of king *Edward* the 4th, against which the said defendant's counsel took exceptions; for that in the said king's licence of appropriation of the said rectories mentioned within the said instrument, there was a proviso and condition for a vicarage there to be competently and sufficiently endowed, according to the statute in that case provided, and said, that the vicarage was never endowed, and therefore the appropriation, as they thought, was void; upon which matter the defendant, having the presentation aforesaid, grounded his title: but for that it was confessed by each party, that the said rectory and parsonage of *Lubbenham* hath continually, from the said appropriation, been allowed, reputed, taken, and used as a rectory and parsonage appropriated; and also, that there had been a vicar, ever since from time to time, presented, and canonically admitted and inducted, to be perpetually there residentiary; and that ever since the same hath been a vicar resident, maintained and sustained to this day as

1588.

Grymes
v.
Smith.

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v.
Smith.

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a vicar endowed ; and that from the time that the first fruits and tenths of all parsonages and vicarages were granted to the said late king *Henry* the 8th, and to his heirs and successors, the said vicarage of *Lubbenham* hath been charged to the payment of the first fruits and tenths unto this day, as all other vicarages endowed have been, as by the certificates and records remaining in the office of the first fruits and tenths, and by the accounts of her highness' revenues of the said county of *Leicester* doth and may appear ; the court was fully satisfied, that the said vicarage of *Lubbenham* was lawfully endowed, and that the said rectory was lawfully and perfectly appropriated, and the condition in the said letters patent mentioned sufficiently performed. In consideration whereof, and for that also it seemed to the court, that it would be a very dangerous precedent to draw in question or examination the original instruments and grants of appropriations of parsonages, and donations of vicarages, in that there be very few within the realm whose originals and beginnings can now be certainly shewed by reason of the long continuance of time past ; and for that also many of the same original instruments never came to the king's hands ; and for many other causes ; it is ordered and decreed, that the plaintiffs shall enjoy the said rectory and parsonage of *Lubbenham*, according to their several estates and interests contained in their said bill ; and that the fee-farm rent hitherto reserved and paid to the queen's highness, and the said tenure by knight's service *in capite*, shall be continued to the queen's highness, her heirs and successors, for ever ; and that all suits brought by the defendant touching the same shall surcease and be stayed, and no farther prosecuted ; and that the said defendant shall not in anywise farther trouble, vex, or molest, the said plaintiffs, their heirs or assigns, by colour of the said presentation ; nor at any time hereafter make title or claim to the same rectory, by force of the same presentation : and likewise it is ordered and decreed, that the bishop of *Lincoln*, within whose diocese the said rectory is, shall be restrained for ever to admit, institute, or induct, the said defendant to the said rectory, by force of the said presentation ; and the injunction, before this time in the said bishop awarded in this behalf, to be continued ; and if the said defendant hath compounded for the first fruits of the said parsonage, then it is ordered and decreed, that he shall be discharged of the sums compounded for to be paid for the same.

M. 31 & 32 Eliz. A. D. 1589.

1589.

Parkins v. Hinde. [Cro. Eliz. 161.]*Parkins
v.
Hinde.*

In prohibition for suing for tithes of land in *Babington*, the case was as follows. The parson of *Babington*, 29 H. 8. leased all his glebe land to *Mills* for ninety-nine years, rendering thirteen shillings four pence of rent, for all exactions and demands. And now his successor sued for tithes of the land, being the glebe land, and upon it the plaintiff sued a prohibition. *Godfrey* moved, that the prohibition lieth, because the land was let rendering rent, and it is for all exactions and demands; and by that the parson bars himself and successors of all tithes. But all the justices *contra*; for *Wray* said, the parson shall have tithes against his lessee, and the words here shall be no discharge; for these tithes arise and accrue after, and are not things issuing out of the land, but collateral and due *jure divino*; and therefore cannot be discharged but by special words: but, if the words had been, as well for tithes growing and arising upon the land, as for other demands, then peradventure it had been a good discharge. But as the case is, it cannot be intended by any words, that he reserved the rent for tithes. And so *Gawdy* justice conceived, especially as the case here is, the lease being of twenty-four acres of land, and only thirteen shillings four pence reserved. And afterwards, the same day, they granted a consultation, but they said, that the words shall discharge the lessee of all rents and services, but not of suit at court, or such things as were not then in demand.

Exactions
and de-
mands in a
lease of
glebe does
not include
tithes.

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M. 32 & 33 Eliz. A. D. 1590.

Nash v. Molins. [Cro. Eliz. 206.]

In prohibition for suing for tithes in *Bocking Park* in *Essex*, the plaintiff surmised, that the lands were parcel of the possessions of the priory of *Christ Church* in *Canterbury*; and that the prior and his predecessors had held them discharged of tithes *tempore dissolutionis*, and pleaded the statute of 31 *Hen.* 8. The defendant pleads, that the prior and his predecessors did not hold them discharged; and upon this issue was joined, and being tried at bar, it appeared, upon the evidence, (a) that the prior or his predecessors, time out of mind, &c. never paid tithes. But no cause of discharge was shewn, whether by unity of possession, real composition, or any other way. *Coke* said, it was no evidence; for it is a prescription in *non decimando*. *Curia contra*, for a spiritual man may prescribe

Spiritual
persons may
prescribe in
*non deci-
mando* for
tithes, and
the paten-
tee, by 31
H. 8. 13.
shall enjoy
the privi-
lege.

1 Leon. 240.
S. C.

(a) The evidence was that of old persons who the lands in question did not pay tithes then or at remembered the time of the monasteries, and that any time afterwards. 1 Leon. 241.

1590. *in non decimando*, and by the statute of 31 H. 8. the king shall hold it discharged as the prior held it; and if he held it discharged *non refert* by what means; for it shall be intended by lawful means: and the jury afterwards found for the plaintiff.

Nash
v.
Moline.

Hil. 33 Eliz. A. D. 1590.

Wickham Bishop of Lincoln v. Cooper. [Cro. Eliz. 216.]

Land be-
longing to
a bishopric
discharged
of tithes
when re-
granted, the
prescription
revives.

1 Leon. 248.
S. C.

IN prohibition for suing for tithes, the plaintiff made suggestion that he and all his predecessors, &c. were seised of the manor of which the tithes were demanded, discharged of tithes during the time that it was in their possession; and shewed that in the time of Ed. 6. this manor was conveyed to the duke of *Somerset*, and was afterwards regranted and came to the bishoprick again. And *Fleming* moved for a consultation; for that it was a prescription in *non decimando*, which cannot be; and upon his own shewing the prescription was interrupted, and cannot be revived. *Curia contra*, for the prescription for a spiritual person is good; and the bishops of *Canterbury* and *Winchester* use to prescribe so; and the prescription is not determined when it came to the bishoprick again, for tithe is not a thing issuing out of land; and unity of possession doth not extinguish it, nor a release of all the right to the land.

P. 34 Eliz. A. D. 1591.

Scory v. Baber.

Finding
straw for
the body of
the church
no good
modus in
discharge of
the parson's
tithes.

Supra, 157.

PROHIBITION against the proprietor of the church of *Southkirby* in the county of *York*, who sued for tithes of hay, and surmised that time out of mind the owners of these lands had found straw for the body of the church in discharge of all tithes of hay. *Coke* moved, that this is no cause of discharge; for the parson was not chargeable with it, nor had any benefit by it; and in Hil. 30 Eliz. it was ruled, that where one prescribed that he had used to pay the parish clerk his wages in satisfaction of tithe hay, this was no discharge, and of that opinion was the whole court: but if he had alleged that he gave the straw to the parson, and he bestowed it in the body of the church, or that the parson had a seat in the body of the church, it had been otherwise; and thereupon a consultation was granted. (a)

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P. 34 Eliz. A. D. 1592.

Green v. Piper. [Cro. Eliz. 276.]

Houses in
London,

It was held by the justices, that a house in *London* which was

(a) — v. *Barne*, post. p. 285. *Portinger v. Johnson*, post. p. 286.

part of the possessions of a priory that was discharged of paying tithes of their possessions, yet by the statute of 37 H. 8. 2. shall be charged for tithes according to the ordinance there; for before that statute no dwelling house was chargeable for tithes, because no profit ariseth of it; and only noblemen's houses are excepted, and P. 35. it was adjudged accordingly, and a consultation was granted. (a)

1592.

Green
v.
Piper.

part of the
possessions
of one of
the greater
abbies, shall
pay tithes
by 37 H. 8.
Moore 912.
S. C.

Tithes can-
not be par-
cel of ma-
nor.

Infra.

Hil. 35 Eliz. A. D. 1593.

Sherwood v. Winchcombe. [Cro. Eliz. 293.]

In prohibition, the plaintiff declared, that whereas king H. 8. was seised of the manor of D. of which a portion of tithes of such a place was parcel time out of mind, &c. conveyed it to him, and he was empleaded in the court christian for these tithes, &c. and upon this declaration it was demurred; for tithes cannot be parcel of a manor, for they are things spiritual, for which at common law a common person cannot sue; and being of a distinct nature, cannot belong to a manor, 10 Ed. 3. 5. 9 H. 7. 46 Ed. 3. *catalla felonum* cannot be parcel of a manor, and although the king may have tithes, yet he hath them not as a lay fee. And of that opinion were all the judges that he could not prescribe for tithes as parcel of a manor; but if had prescribed to have *decimam partem granorum*, this had been good, but not *portionem decimarum*, and a consultation was granted.

P. 36 Eliz. A. D. 1594. B. R. *MSS.

[165]

ONE Rame parson of a church in *Essex*, libelled in the spiritual court for tithe of wood, viz. the branches of pollards, and alleged that they had used to be lopped for 14 or 15 years. And the defendants in the spiritual court brought a prohibition, and alleged, that the body of the trees whereof he libelled for the tithes was timber, and therefore tithes were not payable for the loppings. And so was the opinion of the court; for the body being privileged, that which proceeds from the body shall be privileged also, unless there be a usage to the contrary. For by *Popham C. J.* though tithes should be payable for the loppings, where the bodies are privileged, yet this must be by reason of usage; as, if a man lop a tree which is under twenty years old, and not timber at the time of the lopping; if, afterwards, this tree become timber,

No tithes
are due for
the loppings
of trees, un-
less by
usage.
Q. Whether
this be not
the same
case with
that of Ram
v. Patenson.
Tr. 38 Eliz.
Cro. Eliz.
477.
Moore 968.
Goldsb.
145. where
the same

(a) See *Warden and minor Canons of St. Paul v. The Dean*, 5 Pri. 65. and post. vol. 2.

* This case is extracted from a manuscript book of Reports which was obligingly communicated to me by Mr. Hargrave. The name of the

author does not appear: but the book was given in 1618, by *Arthur Turnor*, to *Serjeant Calthorpe*, in exchange for other books. Mr. *Arthur Turnor* was called a serjeant in 12 Cha. 1.

1594. and be above twenty years old, and] it be used to be lopped every 12 or 14 years, it shall pay tithes; but this is on account of the usage. And he said, there were but few trees in *England* of that nature. (a)

point was ruled.
According to Croke,
Popham C. J. was absent at the decision of that case.

M. 37 & 38 Eliz. A. D. 1595.

Grysmen v. Lewes, Parson of Kingsland. [Cro. Eliz. 446.]

Payment of tithe for one thing cannot be a discharge of it for another. Moore 454. S. C.

[166] In prohibition for suing for tithes of cows, steers, oxen, horses, &c. wherein a custom was surmised, that every parishioner should pay for every milch cow one penny by the year, and for every other cow an halfpenny *per annum*, in recompence and discharge of all tithes of cows, oxen, steers, and calves; and also a penny for every mare, in discharge of all tithes of all horses, mares, and colts there; it was demurred, and a consultation prayed. For tithes paid for one thing, cannot be intended a recompence for tithes of another thing, where tithes are responsible for both in kind: and therefore it was adjudged in sir *Charles Morison's* case, where one prescribed to pay the tenth part of corn in the sheaf, for the tithes of all which is in the sheaf, and of all which is raked; that it was a void prescription, because he is to pay tithes of both of them. (b) It is also unreasonable; for then he may put the less part in sheaves, and leave the greater part to be raked. And the opinion of *Fitz. N. B. 53.* that tithes shall not be paid for the agistment of cattle, is no law. And of that opinion was the whole court, that this prescription is not good to be discharged of one tithe by the payment of another: for he ought to pay somewhat for the tithe of every thing which is due. And if tithes should not be paid for the agistment of cattle, he might employ all his land in the feeding of barren cattle, and so defraud the parson of his tithes. And a special consultation was afterwards awarded *dummodo non agatur de decimis* for milch kine, draught oxen or beasts, agisted for provision for his house.

Tithes payable for agistment of cattle.

Hil. 38 Eliz. A. D. 1596.

[Anon. Moore 430.]

Fenny land drained shall pay tithes immediately.

NOTE. It was adjudged, that fenny land drained shall pay tithes, and that it is not within the statute for barren land to be discharged for seven years. (c)

(a) 1 Roll. Abr. 640.

(b) See *Morton v. Briggs*, post. p. 561. *Torriano v. Legge*, post. p. 909. *Edgerton v. Follet*, post. 555. *Sherington v. Fleetwood*, post. p. 189. *Arch-*

bishop of York v. Duke of Newcastle, post. p.

(c) *Sherington v. Fleetwood*, post. contra, See *Pelles v. Saunderson*, ante, p. 130. n.

P. 38 Eliz. A. D. 1596.

Bedingfield v. Feak. [Cro. Eliz. 467.]

PROHIBITION. The case was as follows: In the village of *D.* in *Norfolk*, there hath been a parsonage, and vicarage to the church thereof, time whereof, &c., and the parsons have always had the great tithes, and the vicar the small tithes; and the parsons for forty years have had the tithes of such a field, viz. the corn: and it was now planted with saffron, and the vicar sued for the tithes thereof, and the parson sued a prohibition, and it was thereupon demurred. *Coke* moved, That it well lay; for by the statute of 2 *Ed.* 6. tithes shall be paid, as they had been paid for forty years before, which had always been to the parson: and although the land be now otherwise employed, yet the parson shall have the tithes thereof: and therefore it hath been adjudged here in the case of *Shipdam* park, in *Norfolk*, where 10s. was always paid for the tithes of all things *renovant* within the said park, and afterwards the park was disparked, and converted into arable land; yet no other tithes should be paid but the 10s. *Popham*; It was otherwise ruled in the exchequer, in master *Wroth's* case, for a park in the county of *Somerset*. *Fenner*; The law is certainly, as it is cited in that judgement in this court. And the clerks said, that they had divers precedents in court, according to the judgement cited. *Popham*; The difference is, when the prescription is to pay money for all the tithes of such a park, and there peradventure, if it be disparked, he shall not pay any tithes (a); and where it is to pay the shoulder of every buck, or a doe, at *Christmas*, for all tithes of the park; there, if it be disparked, tithes shall be paid as of other land. (b) And in the principal case he held, that the vicar should have the tithes of saffron, as *minutæ decimæ*. For notwithstanding that tithes had been always paid for that land to the parson, yet being converted to another nature and use, it shall be paid to the vicar, as if it had been converted into an orchard. So, if the vicar is to have all the hay, if the meadow be converted into arable, the parson shall have it: so, *e converso*. Wherefore a consultation was awarded.

1596.
Bedingfield v. Feak.
Saffron is a small tithe, and belongs to the vicar, though raised upon land which before produced corn, the tithe of which was paid to the rector.
Moor 909.
Owen 74.
Gouldab.
149. S. C.
[167]

H. 38 Eliz. A. D. 1596.

Ram v. Patenson. [Cro. Eliz. 477.]

PROHIBITION upon the 45 *Edw.* 3. c. 3. for that whereas he libelled in the spiritual court for tithes of timber trees. The defendant said that those trees were long since *mortuæ aridæ et putridæ*, fit only for firebote and not for timber. It was thereupon demurred;

Timber trees above 20 years' growth shall not pay tithes

(a) See *Hardcastle v. Sclater and Others*, post. 786.

(b) *Skinner v. Smith*, post. 526. *Nanton v. Clarke*, post. 609.

1596.

Ram
v.
Paterson.

though decayed, and only fit for fuel; and loppings of the same growth are also discharged.

and all the justices (*Popham absente*) held that no tithes should be paid for those trees, for being over the growth of twenty years they were once discharged of tithes, and therefore shall always be discharged. Another point was also then moved, the suit being for the tithes of the loppings of the trees, and the truth was, those trees had not been lopped for twenty years together, so as then the branches of the lopping were discharged from tithes; but afterwards they were lopped every seven years — Whether now tithes shall be paid for these branches; and they all held, that they shall not pay tithes, for as the body is privileged so are the branches. (a)

P. 38 Eliz. A. D. 1596.

* *Wright v. Wright*, Executor of *Wright*;

or,

The Bishop of *Winchester's* Case.

Spiritual persons, their tenants and farmers, may pre-

[168]

scribe in non decimando. —

In a suit for tithes in the spiritual court, a man may have a prohibition suggesting a prescription or modus before or without pleading it. — See as to this point, 2 Salk. 551. Contra. 2 Co. 43.

In a prohibition between *Robert Wright* plaintiff, and *John Wright* defendant, which began *Pasch. 38 Eliz. Rot. 628.*, the case was as follows: the plaintiff shewed, that *Stephen Gardiner*, bishop of *Winchester*, the 4th day of *July*, 38 *H. 8.*, was seised of the manor of *Eastmean*, in the county of *Southampton*, in the right of his bishoprick; and that the said bishop, and all his predecessors of the said bishoprick seised of the said manor, had holden and enjoyed the site of the said manor, and all the demesnes of the said manor, *a tempore cujus, &c.* for him, his tenants and farmers, for years, or at will, *exonerat' acquietat' & privilegat' de & a solutione decimarum quarumcunque de, in vel super præd' scil' & terr' dominic' & qualibet seu aliqua inde parcel' annuatim quovismodo per totum tempus præd' crescent', contingent', sive renovant'*: And the plaintiff conveyed to himself an interest for years in parcel of the demesnes of the said manor, by the demise of the said bishop; and that the defendant being farmer of the rectory of *Eastmean*, had libelled against him for tithes growing within parcel of the demesnes of the said manor, before the judges delegates; and although the plaintiff

(a) See *Walton v. Tryon*, post. 827. 833. contra. *Biggs v. Martin*, post. 549.

* The report of this important case is extracted from the manuscript book of reports I have already referred to (*supra* 165.) from the collection of *Mr. Hargrave*. It is a much fuller and more correct note of the argument than any we have in print: *Walter's* argument is ingenious, logical, and spirited, and is the more valuable, because the authority of this case hath been shaken upon that point of it which he so much laboured; it having been since holden that a prohibition shall not issue upon the mere suggestion of a modus, or prescription, but that it must be first pleaded, and such plea must have been rejected in the spiritual court. 2 Salk. 551. See also 1 *H. Bl.* 100. It appears

from this report that my lord *Coke*, who was then attorney general and counsel for the plaintiff, has in his report of the case ascribed most of the topicks of his argument to the court. Indeed his lordship cannot be considered as affecting to give a correct statement of the resolution of the court upon this particular case, so much as of the general law upon the subject, as he cites a case in support of that resolution which was subsequent to it in point of time; I mean, the case of *Pigot v. Herne*, which was determined in *Hil. 40 Eliz.* I have subjoined my lord *Coke's* report of the case, because the references are in general made to that report, and because the opinions of so great a man must command the attention of every one who has studied, and who respects the laws of *England*.

had shewed all the matter, and pleaded the same before them, and offered with inevitable proof to prove it, yet *prædicti iudices delegati in prædict' cur' christianitatis coram eis placitum, allegationes & probationes prædict' Roberti Wright admittere recusaverunt*. The defendant to have a consultation, confessed that the said plaintiff had alleged all the matter aforesaid before the judges delegates, and that the judges delegates allowed the plea and allegation of the plaintiff, and admitted him to his proof thereof; *absq. hoc quod præd' iudices delegati in curia christianitatis coram eis placitum allegationes & probationes prædict' Roberti Wright admittere recusaverunt*. And upon this plea the plaintiff's counsel demurred in law.

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475. 511.
Moor 425.
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Walter, of the *Inner Temple*, argued for the defendant in prohibition. The principal matter, he said, is, if the plea in bar be good; and that involves this question, whether the traverse of the refusal of the plea in the spiritual court be well taken, or not. And it seemed to him that the traverse was properly taken. A man is always to traverse that which is material, and the substance of the action of the other party. Then the substance, ground, and cause of this prohibition is, the refusal of the plaintiff's plea in the spiritual court. For prohibitions are grantable to the spiritual court in two cases only: the one, when the spiritual court hold plea of that which appertains to the common law: (for the common law has the prerogative, and where the common law may intermeddle, there the spiritual court shall not interfere: and in such case (as 8 R. 2. *attachment sur prohibition*), a man shall have an attachment without a prohibitions, for the law is a prohibition). The other case wherein prohibitions are grantable, is, where the spiritual court is not competent to do right to the parties. In all other cases prohibitions ought not to be granted. In 44 E. 3. 32. if a man sue in the spiritual court for rent reserved on a lease of tithes, a prohibition lies; for an action of debt may be brought for this at common law. In 22 E. 4. 20. b. if I owe one 10*l.* and swear to pay him by a certain day, and upon that he sues me in the spiritual court *pro læsione fidei*, a prohibition lies; for he may have an action of debt against me for this at common law. So *Pierce Peckham's case*, 4 H. 7. 13. If a man sue one in the spiritual court for a spiritual cause, and they refuse to deliver the libel to the party according to the statute of 4 H. 7. c. 3. by all the judges, a prohibition is to be granted; for the non-delivery of the libel is a tort, which tort is a matter temporal, and punishable by the temporal laws; so that in these cases a prohibition is grantable. Then *here* the subject of the suit in the spiritual court is tithe, which is a spiritual thing: but the cause of the prohibition is the tort done to the plaintiff by their not allowing his plea and proofs; then that is the substance of his suit, and if so, it is traversable more pro-

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perly than any thing else : for whether there be such a prescription or such a lease as the plaintiff has alleged, is not the cause of the prohibition ; for if this be true, and the spiritual judge admit his plea, he cannot have a prohibition ; so that the refusal is the sole ground and cause of this suit, and therefore must be traversable within the general rule of traversing.

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But it will be objected, and so it has often been in such cases, that the allegation of this refusal is merely matter of form, and not material, and therefore of course not traversable. Sir, that we deny. For if a man be sued in the spiritual court, and it be admitted, that he has matter to plead which at common law would bar the libellant, but that such matter would not be any bar by the spiritual law ; yet, even in this case, he shall not have a prohibition until he has pleaded such matter in bar in the spiritual court ; or, if, after he has pleaded it, he sues out a prohibition, and does not allege that he offered such plea, and that it was refused, upon that surmise he cannot maintain the prohibition. This appears by 7 E. 6. 79., where a case is put, that a man had used to pay for the tithes of a close for the space of six years and more, 12*d.* *per ann.* to the parson or vicar for the time being, and being sued by the farmer of the parson in the spiritual court for the tithes in kind, he pleaded this payment of 12*d.* for the tithes, which plea was not allowed by the ecclesiastical judge, and sentence was given for the farmer. A prohibition was granted in this case by the king's bench by good advice, there being an averment in the suggestion that the spiritual court would not admit his plea ; which matter without that averment in the suggestion would not have been of itself sufficient : so that this is material, and not a thing of mere form. Accordingly it was adjudged in this court, *H.* 30 *El.*, in the case of *Bagnall v. Stokes*. *Bagnall* sued in the spiritual court for a legacy, whereas the defendant there had a release from him of the legacy, but there was only one witness to prove it, and thereupon a consultation was awarded : but, if in his suggestion he had shewn, that he had pleaded this release in the spiritual court, and produced his witness, and they would not allow it, because there were not two witnesses, it was agreed, that this would have been a good suggestion. Which proves that this allegation is material, else the omitting of it could not have been material. If this be not allowed, it will alter the whole course of the law ; for it is a rule, that a man shall not have a prohibition upon that which he may plead in the spiritual court. So is the 8 E. 4. 14., where *Choke* says, if a parson lease to me by deed all the tithes of his benefice, and afterwards sue me for the tithes of my own lands, I shall not have a prohibition ; for I may plead this in bar in the spiritual court. And so it was in this court in the 31 of *Elix.* between

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Cooper and lady *Gresham*, who libelled as appropriatrix of the parsonage against *Cooper*, in the spiritual court for tithe hay, and he suggested that he and those whose estate, &c. have paid from time immemorial to the vicar of that church 4*d.* for the tithe hay of that manor; and it was adjudged that a prohibition did not lie upon this, for the *modus decimandi* did not come in question; but the matter was, whether this belonged to the parson or the vicar; and it is a good plea in the spiritual court to allege, that the tithe belongs to the parson or the vicar; whereupon a consultation was awarded. So that wherever the matter is pleadable in the spiritual court, a prohibition shall not be had upon it. And in this case it appears that it is a good plea; for we by way of bar allege, that he pleaded this matter, and the court allowed it, and received his proof, whereupon he demurs, which is a confession of all matters in fact duly and properly pleaded: so that it appears to the court by the confession of both parties that it might be, and had been pleaded in the spiritual court, and had been there allowed.

But it may be objected, that though the parties have agreed upon this so as to conclude themselves, yet that this does not bind the court, who are still at liberty to judge upon it according to what they know from their own judicial knowledge. But I say, that upon this point of spiritual law, the court have no judicial knowledge at all, for that it is a matter merely spiritual. This appears in 34 *E. 1. Dett.* 164. If I am bound to enfeoff *I. S.* of the manor of *Dale* such a day, and on that day he enters into religion, or dies; in debt upon this obligation I may say, that "on the day he entered into religion, or died:" and I need not plead that I tendered the deed of feoffment on the day: for it is apparent to the court that I could not perform the condition, so that I could not be bound to make a tender of that which was become impossible. But in the above book it is, that if I am bound to present *I. S.* to a benefice, when it becomes vacant, and at the time that it falls vacant, he is married, so that by the canon law he is incapacitated from taking it, in that case it is not sufficient for me to say in an action of debt that "*I. S.* was married at the time;" but I ought to say, that "I presented him to the ordinary, who refused to institute him as being an unfit person;" for this is a spiritual matter of which this court cannot judge. And that this court cannot take notice of spiritual matters appears by the general learning of the books, where it is taken for a rule, that if the act be alleged to be done in the spiritual court, it shall be taken to be duly done, and shall never be examined here; for this court cannot judge of their law. In 4 *H. 7.* 14. b. if two persons are candidates for the place of abbot, and one of them has two votes, and the other twenty; and they interplead in the spiritual court, and there it is awarded, that

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Q. Whether this case be correctly

[171] reported by Croke.

In the same book, page 139., it seems as if it had turned upon a different point.

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he who has the smaller number of votes shall be the abbot, he shall be admitted to be the abbot, and shall sue and be sued here as such.* In 20 *E. 3. Conisans* 46. if a layman be made an abbot who has conusance of pleas, he shall demand conusance in this court, and the king shall not countermand it by reason of the disability of his person; for being abbot in fact, it shall be allowed to him in this court until he is deprived. So in 40 *E. 3. 28.* by *Kirton*, if a divorce be unduly obtained in the spiritual court, yet it shall be allowed in this court, until it is repealed. Which proves that this court has no judicial knowledge of their law. For how can they have it? for their spiritual laws are continually altered by constitutions, as the common law is by statutes. And how can this court know every constitution? It is not possible. They can have no judicial knowledge of any thing contrary to the agreement of the parties. And the truth in our case is, that the defendant actually pleaded this matter, and produced his proofs, and they were not sufficient to prove his allegations: if then this allegation be not allowed, great mischief and inconveniency will ensue, and the spiritual court cannot determine any matter. For if I am sued in the spiritual court, and I plead matter of bar, or discharge, or proceed to proof of it, but my proofs fail, whereupon sentence is given against me for default of them; and I afterwards come here or to the common pleas, (but more especially here, for it appears by the books that the common pleas cannot grant a prohibition, but where the matter which is in suit in the spiritual court is depending in suit before them; whereas this court can grant a prohibition in any case), and I surmise, that I offered such matter in the spiritual court, and they refused my plea, or that I had but one witness to prove it; if then this surmise be not traversable, I compel the other party to take issue with me here, and the matter shall be tried here again. I know the whole matter, and all that he can allege in the spiritual court, and now *

* The passage is so blind in the manuscript, as to be in this part wholly illegible.

which is a great inconveniency, an intolerable mischief, charge, and delay, to the party. In 1 *R. 3. 4. Hussey* held, that if the original suit ought to begin in the spiritual court, and be there begun; though a thing which is triable by our law should afterwards come in issue, yet it shall be tried by their law. But, if such suggestions as these are suffered to pass without any check or controul, they will never try a thing triable by the common law, nor a thing triable by their own law; but when the defendants have pleaded in the spiritual court, they will come here, and surmise that they offered such matter in the spiritual court, which that court would not admit, and then they will try it here. So that the admission of these false surmises will be the utter subversion of all law and practice.

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But it will be farther objected, that this is but a surmise contained in the declaration, and surmises are not traversable. I must agree that surmises of themselves are not traversable; but then this is not a mere surmise; for every matter alleged in the declaration is not a surmise; for there is matter in fact alleged in it, as well as surmise. As in a formedon, the gift is traversable, for that is alleged in fact, but the deforcement is surmised. The surmise is always the point of the writ, and that cannot be traversed; but all other matters alleged in the declaration are traversable. The point of the writ in our case is, that he sued *contra prohibitionem regiam*, and that, it is true, is not traversable. So in *Pell and Sanderson's* case in the 1st of *Eliz.* it is said, that the defendant ought to defend the contempt, but shall not traverse it. But this matter of the refusal of the plea is a thing alleged in fact, and not a surmise, and so we are not within the rule. But, if it be a surmise, yet in this case it is traversable; for this is a cause which ousts another court of their jurisdiction, which is prejudicial to that other court, and therefore traversable; as in 12 *H. 4.* 13. 17. and 13 *H. 4.* 14. this difference is agreed; that if a man remove a plea out of any court, which is not the king's court, for a certain cause, such cause is traversable: but, if it be out of one of the king's courts; it is otherwise; for both being the king's courts, no prejudice is done to any other person by it, as it is where it is removed from the court of a stranger. In this case, the court to which the prohibition is to go is the ecclesiastical court, which will be prejudiced; so that the matter of the surmise is traversable. In 34 *H. 6.* 15., if a man sue one in the common pleas, and he pray his privilege of the exchequer, for that he is a servant of one of the officers there, and attendant upon him in his office, this is traversable; for it may be said, that he is the officer's husbandry servant in the country, *Without this*, that he is attendant upon him in his office, which is a good plea.

It may then be objected, that the practice of this court is quite contrary, and that no such traverse has ever been seen here. But that is not so, for several cases have been resolved here upon that point. The first case was that of *Eaton and Morris*, *P. 30 Eliz.*, where the plaintiff sued out a prohibition, and alleged that the defendant, as parson of *D.*, had sued him in the spiritual court for tithes, and that he had there pleaded, that the defendant had not read the articles according to the statute of 13 *Eliz.*, and so was *ipso facto* deprived, and that the spiritual judge had refused to admit that plea; upon which it was moved on the other side that a prohibition would not lie upon this, for it was pleadable in the spiritual court: and it was alleged, that it was false, and used only for delay, upon which the court advised the defendant in the prohibi-

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tion to traverse it; and by that advice the defendant pleaded, that the spiritual judge did not wholly refuse to allow the plea, *et de hoc ponit se super patriam*. The plaintiff demurred to this plea, and it was adjudged to be no plea, as it was pleaded, for this issue could not be tried, no place being alleged where the court was kept. For it is not necessary to allege it in the declaration, because that contains divers issuable matters, and it is not the practice to allege it there. But when one of two things is traversed, the place shall be shewn in the replication, which might well have been here, if he had taken his traverse with an *absque hoc*; but when he says *quod non penitus recusavit, et de hoc ponit se super patriam*, he has stopped the plaintiff, so that he cannot come with his replication to shew the place; and for that reason the plea is ill. Besides, when he says *non penitus recusavit*, this makes the issue uncertain and pregnant. And for these causes the plea was ruled to be bad; though it was holden, that it was traversable if well pleaded. In *Tr. 30 Eliz.* there was the case of *Astol and Wigen*, where there was the like surmise, that he had pleaded that the parson had not read the articles, and that that plea was refused in the spiritual court; and the court being informed that this was false, they advised the defendant to traverse it; and it was urged by *Coke*, that this was not traversable; but notwithstanding that, the opinion of the court was, that it might be traversed. And so they advised Mr. *Lewkner*. So in *Hil. 32 El.* a prohibition was brought here upon the same surmise again, and the case was moved by *Lewis*, who informed the court that it was brought solely for delay, and that the surmise was false; and the whole court advised him to traverse the offer or refusal. In many other cases I have known this debated for the king, and agreed that the surmise was traversable. The case of *Futter and Whiskin* was moved by Mr. Attorney, that if a prohibition be sued here, and it be surmised that the plaintiff pleaded such a matter in the spiritual court, and offered one witness to prove it, and the spiritual judge would not admit it, if the defendant will plead, that he offered two witnesses in the spiritual court to prove it, *absque hoc* that he offered only one; Mr. Attorney insisted, that this was not a good plea; but all the court held it to be a good plea; wherefore the surmise is traversable. In *M. 32 & 33 Eliz.* there was the case of *Bennet v. Shortwright*, parson of *Matching*, who had libelled in the spiritual court for tithes of corn: the defendant sued out a prohibition, and surmised that in that parish they had immemorially used to pay the tenth sheaf in satisfaction of all tithes of corn; and in those years in which the subtraction was supposed, he had severed it from the nine parts, and the parson had taken it; and he alleged, that he had offered this plea in the spiritual court, and they had refused it. *Godfrey* moved,

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that a prohibition would not lie in this case, inasmuch as here was no *modus decimandi*, but it was only for tithes in specie; so that it is confessed that the plaintiff has cause of suit in the spiritual court. But the court held the suggestion to be good; for if a parishioner set out his tithes, but the parson will not take them, or they are destroyed by cattle, he shall not have the tithes again; and if the spiritual court will not admit such a plea, a prohibition lies. *Godfrey* then said, that he would take issue that the spiritual judge did not disallow it; and the court said that he might do so. In *H. 33 Eliz.* a prohibition was sued out to the admiralty court upon a suit there on a bond, surmising that it was executed in *England*, and not beyond the sea. There, it was agreed, that if the bond be executed upon land, the suit should be at common law; but, if it be executed beyond the sea, the party has his election to sue in the admiralty court, or in this court; and that for this reason, that it may be, that all his witnesses whom he has to prove the bond are abroad, so that he cannot have any benefit from it here; but in the civil law he may in this case, if the truth be that the bond was executed abroad, and that his witnesses are there. If then he sues in the admiralty court, and the defendant surmises that the bond was executed here upon land in order to have a prohibition, and this surmise cannot be traversed, it will take away the whole benefit of his bond. And so all these mischiefs, and many more, which the understanding of the court will imagine, will ensue upon this, if these false surmises are not to be traversed.

As to the second point, *viz.* the prescription that the bishop, and his predecessors, for themselves, farmers, and tenants for years or at will, have holden and enjoyed the said lands privileged and freed from the payment of all tithes renewing and coming of or upon the said lands, it is not good; for it is a prescription in *non decimando*, which cannot be. In the 8 *E. 4. 14.* *Choke* puts this generally without exception, that a man may prescribe in *modo decimandi*, but not in *non decimando*. The reason is, that at first parsonages consisted solely of tithes, and so several do now; but by the bounty of good men they were afterwards endowed with glebe: if then men might prescribe in *non decimando*, the successors would have nothing to live upon in a little time. However, a difference has been taken between a layman and a spiritual man: a spiritual man may prescribe in *non decimando*; and the reason is, that this is no prejudice to the church, for the church will still have the tithe. But, if a layman were to keep the tithe, then that would be a prejudice to the church. According to this it was ruled in this court *Hil. 33 Eliz.* between *Wickham, bishop of Lincoln, and Cooper*. *Cooper* sued the bishop in the spiritual court for tithes, and the bishop sued out a prohibition, and surmised, that he and his prede-

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cessors were seised of the lands of which the tithes were demanded, and that when they were in their possession they had holden them discharged of tithes; and he shewed, that in the time of *E. 6.* the lands were granted to the duke of *Somerset*, and that they afterwards came back again to the bishoprick. In this case there was great debate if this prescription were good, and yet it was special only, to hold the lands discharged, whilst they were in their own possession. But the prescription was holden to be good; for it was said, that tithes are spiritual things of which a spiritual person may prescribe to be discharged, though a temporal person cannot. But in the present case the prescription goes farther; for here it is for himself, his farmers and tenants for years or at will; and it seems to me, that this cannot be good for his tenants for years or at will, for they are not spiritual persons. Besides, this is annexed to the person of the bishop, and not to the lands, so that the lessees cannot partake of it; for of a privilege annexed to the person of a man no one else can have the benefit. And therefore in 30 *H. 8.*, if a parson make a feoffment of the glebe, the feoffee shall pay the tithes of it to the feoffor, for he does not partake of the privilege annexed to the person. And it was so adjudged in this court, *M. 31 & 32 Eliz.*, between *Perkins and Hinde*. If a parson lease his glebe, rendering a small rent*, he shall have the tithes: but, if a great rent be reserved, nearly to the amount of the value of the land, he shall not have the tithes; for it shall be intended that this rent was reserved as well for the tithes, as for the lands. It will be a hard matter to make this a good prescription as it is laid. It is not good, as it seems to me, because the prescription is in tenants for years and at will, viz. that by himself and his farmers he has holden the lands discharged, which cannot be good, as in *Chaworth's* case in 9 *H. 6.* 62., where in trespass the defendants pleaded, that the prior of *St. John of Jerusalem* was seised of such a manor, and that he and his predecessors, and all their tenants at will of the said manor had had common of turbary in the place where, &c., and that they as such tenants at will of the said manor, &c. And by the whole court, Clearly this is not good, for tenants at will cannot prescribe in this manner; for they ought to say, that the lord of the manor of *S.* hath had common for himself and his tenants at will. And so is 11 *H. 7.* 6. Then here he lays the usage for his tenants at will, which is just as if he had prescribed that he and his tenants had holden the lands discharged. But, if he had prescribed for himself and his tenants, the nature of the thing would shew that

* This case is not correctly stated by Mr. *Waller*. The judgement of the court was not governed by the reason here given. *Vide supra* 162.

that could not be: for he could not have the land discharged for him and his tenants, because tithes are not parcel of the land, and a thing issuing out of the land, but they are a collateral profit, to be taken upon the land. This appears by the case of *Sherwood and Winchcombe* in 34 & 35 *Eliz.*, where a man prescribed to have tithes as parcel of a manor: for by *Popham*, nothing can be parcel of a manor but what is part of the land, or issuing out of the land; and tithes are but collateral things to be taken upon the land. That is the reason too of 30 *H. 8.*, that if a parson make a feoffment of his glebe, or purchase land within his parish, and make a feoffment of that land, he shall nevertheless have tithes from his feoffee; the tithes are not extinguished, because they are not things issuing out of the land. So in *Hinde and Perkins* it was agreed, that if a parson release to his parishioners all his right in the land, yet this does not extinguish his tithes, for they are not issuing out of the land. Then if they are not issuing out of the land, when he makes a lease for years, he is not chargeable by any means with them; therefore he cannot have a discharge for himself and his tenants for years &c., for his estate was never charged.

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But this prescription is not good for another reason: for he prescribes that *Stephen*, and all his predecessors bishops of *Winchester* for the time being, seised of the aforesaid manor, but does not allege that any one of them was actually seised. This therefore cannot be good, for here is no ground for the prescription. *Brit. tit. Prescription*, 100., shews the difference between a custom and a prescription; the one goes with the land, the other with the person, which person ought to be able to prescribe, *aliter nil valet*. So, where one alleges a custom in a vill, he ought to say that the vill is an ancient vill, otherwise it is not good. It was adjudged to this effect in *Iseham's case*, in 6 *E. 6.*, where, in trespass for breaking the plaintiff's park, called, &c. and treading down his grass with hogs, and cutting it, the defendant pleaded, that Sir *John Arundel* was seised of the said park, and granted to him the office of _____ of the said park _____ from time immemorial, had used to have common of pasture for all their cattle in the said park, and when the grass was grown, to cut it and make it into hay, and so justified the trespass; it was holden, that this plea was not good, for that this could not be an ancient park; and further it is not alleged before the prescription that he was seised, and so he does not enable himself to prescribe. In 35 and 36 *Eliz.* there was one *Clarke's case* at *St. Albans*. He was sued for the tithes of 16 acres of wood, and surmised in a prohibition that these 16 acres were parcel of such a park, and that he and all those whose estate he had, had used to pay 4*d.* for every acre of wood; but he did not allege, that he was seised of the park, and

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for that reason the prescription was held not to be good. So here, when he says that *Stephen* and all his predecessors seised of the said manor have been discharged, and does not state that *Stephen* was seised, this is not good. For every prescription ought to be certain. Indeed it may be certain, though the expression should be otherwise than that he was seised. As if the words were part in the ablative case absolute, as in *Adams* and case, where an ejectment was brought for entering into a house and 100 acres of land, and it was stated that the prior of *M.* was seised of the land and demised it to *Roger Wilcocks* for years; the reversion being in the prior, he leased it to the plaintiff by the name of his brother of *B.* with all lands thereto belonging, then in the tenure of *Roger Wilcocks*, for 60 years after the determination of the said term to *Wilcocks*: exception was taken, that there was no averment that the land was in the tenure of *Wilcocks*; but the court overruled the objection, and said, that those words being part absolute in the case, were a sufficient averment. But here it is not so, but amounts to no more, than that all his predecessors were seised; which would not be sufficient.

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This prescription does not extend to discharge the plaintiff of the tithe of lamb and wool; for it is, that they hold the lands discharged of all tithes, which must be understood to be the tithes of those things which come immediately from the land, as hay, grain, and fruit, and not of the cattle upon the land, with the wool of those animals. For prescriptions shall be taken strictly. In 5 *E. 4.* 12. if a man prescribe for himself and his tenants at will, that will not serve for copyholders, and yet they are but tenants at will. In 9 *El.* it was holden in a case between *Rush* and *Berrington*, where a man prescribed to have common of estovers, as belonging to a house, that this should not extend to house-bote and plough-bote, but only to wood to burn in the house. So here this prescription shall not extend to sheep, &c.

Coke, the queen's attorney. — There are two points; the first, whether the prescription be good: and the other, whether the traverse be good. I argue that the prescription is good; and we are to inquire who was capable of tithes in pernancy at common law, and who was capable of a discharge from them, and in what manner they could be had in pernancy, and how there could be a discharge of them at common law or afterwards by any means. As to the first, I hold that no persons but spiritual persons were capable of tithes in pernancy, for none but spiritual persons could take tithes.* For the men of the church were like the apostles, who

* The manuscript is here imperfect, and two one sentence. The council of *Lateran* is stated or three passages seem to be huddled together in to have been under the emperor *Dioclesian*.

had no certain livelihood, but depended upon the devotion of the people to give what they pleased and to whom they pleased. As *Parn.* says in 7 *E. 3. 5.*, before a constitution then lately made by the pope, a patron might give to any parson of any parish he pleased. But men were more careful to give their tithes at that time than they are now, and the church had its . . . You may see in the time of *William the Conqueror* the care that was taken touching these things, *de omni annona sua decima garba insimul de omnibus rebus quas dederit Deus tuæ decimæ reddendæ sunt.* And I have heard Dr. *Andrews* say, that this was their tenure of God; and 11 *Ass. 29.*, no man can sue for tithes but only a spiritual person; and by 22 *Ass. 157.* the parson of each parish shall have the tithes; and if they are not within any parish, then the king shall have them; for he is capable of tithes in pernancy, because he is *persona mixta*. And in 44 *E. 3. 5.* in an assize for tithes before *Lodlow*, he said, that in former times every man might grant his tithes to what church he would; so that it must be always a spiritual person who had them by way of pernancy. And to the same purpose is 10 *H. 7. 13.* It was taken to be a damnable thing that a layman should have tithes. But there is a difference between a common person and the servant of a parson. By 33 *H. 6.* the lessee of a parson shall have tithes; and he shall sue for them in the temporal court. Indeed 35 *H. 6.* and 40 *E. 3. 28.*, in suits between the vicar and the parson, the spiritual court shall have jurisdiction; but 45 *E. 3. 17.*, if the right to tithes come in question between the farmer of a parson and a layman, the trial shall be at common law and not in the spiritual court. It appears therefore that the farmer of a parson might have had tithes in pernancy; and now the statute of 31 and 32 *H. 8.* gives laymen a remedy for them in the spiritual court. For before this statute, a layman could not have tithes in pernancy, because he had no remedy for them: but any layman was capable of being discharged of tithes, because there he was not put to any action for them. In 8 *E. 4. 13.* a layman prescribed to be discharged of tithes, under a composition with a predecessor of the parson and the ordinary, who granted that he and his assigns should be discharged; and the discharge was holden good for him and his assigns. So *F. N. B. 41 G.* And in the *Register 38. b.* there is an instance of such a composition with the assent of the bishop as patron and ordinary. It follows therefore that a lay person might be discharged of tithes at common law, though he was not capable of them in pernancy, having no remedy to recover them; and it is all one not to have the

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The omission might have been supplied, if the passages had seemed to be of sufficient importance; for my lord Coke, in his report, has put them in the mouth of the court.

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thing, and to have no means of getting at it. But now the statute of 32 H. 8. c. 7. gives a layman a remedy to recover the tithes which he is capable of taking. If then he is capable of taking them in pernancy, let us see how this right to them in pernancy arises. This must be either by composition, or by grant, or by prescription; and so of discharges of the payment of tithes. But we must give a remedy in this court to the party who has such discharge; for if he has no remedy here, he will be without remedy.

For in this point we act quite contrary to the civilians: they will not allow any discharge of tithes, because, they say, that tithes are due to the church *jure divino*, and therefore the person being lay, and tithes spiritual, they will not admit any plea in discharge of them. A layman of himself cannot originally be discharged of the payment of tithes by prescription, but the prescription must first settle in a person who can prescribe in discharge of them; for if it do not first settle in such a person, no benefit can arise from it to any one. But, if the prescription of discharge be once settled in any one who is capable of prescribing, if he transfers it to another, that other shall take advantage of it. And for this I rely upon the words of the statute of 32 H. 8. c. 7., that “no person
“ or persons shall be sued or otherwise compelled to yield, give, or pay
“ any manner of tithes for any manors, lands, tenements, or heredita-
“ ments, which by the laws and statutes of this realm are discharged
“ or not chargeable with any such tithes.” So that it appears by the very words of the statute, that the law allows a discharge of tithes, and for that reason the statute provides a remedy. And as the civilians will not allow this, it is reasonable that we should give a remedy here. As to the other mode of discharge by grant or composition, I rely upon *F. N. B.* and the *Register*; for where it was granted to *A.* with the consent of the patron and ordinary, that he should be discharged: there, if he assigned to *B.* *B.* should enjoy this discharge. If then a discharge be settled in a man by grant or composition, and his assignee shall take advantage of it, so it shall be here with the lessee of the bishop. For in this case the bishop has made a lease for years, and the prescription first settled in the bishop, who is capable of prescribing to be discharged: and this discharge runs with the land; and the very words of the stat. of 2 E. 6. c. 10. § 4. provide, “that no person
“ shall be sued or otherwise compelled to yield, give, or pay any
“ manner of tithes for any manors, lands, tenements, or heredita-
“ ments, which by the laws and statutes of this realm, or by any
“ privilege, or prescription, are not chargeable with the payment of
“ any such tithes, or that be discharged by any composition real.” The statute therefore allows a discharge of tithes in the land, and the discharge to follow the land, if the discharge has had a legal

commencement. Here the discharge had such commencement; it first settled in the bishop, and so runs to his lessee. And there are several manners of discharge, as appears in 10 *Eliz. Dy.* 277. *b.*, where it is said that the Templars, Hospitallers, and Cistercians, had a privilege from *Rome*, *quod non tenentur solvere decimas prædiorum suorum quæ propriis manibus aut sumptibus excolunt*, but that their farmers should pay tithes. In *Knight and Spencer's* case, unity of possession was held a sufficient discharge from the payment of tithes, and that this might serve for their farmers; as appears by the case of the templars, who were discharged of the tithes of those lands, *quas propriis manibus aut sumptibus excolunt*; and no doubt but that if it had been general for them and their farmers, it had been good. And here we are just in the case of such a prescription. For this I refer to a case in 18 *Eliz. Dy.* 349. *b.* It is the case of the parsonage of *Peykirke* and *Elmeton* *justa Peterborough*; where the dean of *Peterborough* prescribed that no tithes were ever paid in the manor in question by the farmers by lease or at will, except wool and lamb; and the parson libelled against one of the farmers for tithe of hay and grain, a prohibition was granted. And this in effect is our case; for the lessee was discharged by the prescription in the parson for himself and his farmers. It was agreed in the 28 *Eliz.* in the case of the *bishop of Winchester* and the parson of *Buckden*, that the bishop might prescribe to be discharged of tithes; for he who may have tithes paid to him, may prescribe to be discharged of them. But there indeed there was no lessee. But in 34 and 35 *Knightley's* case (a), commonly called the *Case de Ratione*, it was agreed, that if a parson has been parson imparsoned time out of memory, so that no one can tell, he by this prescription may be discharged; but, if he makes a lease, his lessee shall pay tithes: but, if he prescribes that he and his lessees may retain, then he and his lessees shall be discharged by way of retainer. There was a case between and *Grevell*, which was like the present case, and the defendant pleaded the same plea; and in that case by order of the court issue was taken, whether the lessee had paid tithes or not; for if he had not paid them before, he should be discharged; and there the freehold was out of the spiritual person who prescribed. But here the freehold is remaining in the bishop, and therefore his lessee shall be privileged from the payment of tithes. And so upon that point I pray a prohibition.

As to the point of the traverse it seems to me, that the refusal is not material, and therefore not traversable. And as this seems to be plain, I will be short upon it. It has been often ruled. There is the case of *Eaton and Morris*, *M.* 31 & 32 *Eliz.*, where, upon a

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(a) 1 Leon. 331. *Knightley and Spencer's* case.

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suit for tithes in the spiritual court, the defendant sued a prohibition, and surmised, that the parson who had libelled against him in the spiritual court for the tithes had not read the articles according to the stat. of 13 *Eliz.*, and so was not parson to demand the tithes, and that he offered this plea to the spiritual court; and they refused it; the defendant in prohibition said, that they accepted the plea in the spiritual court *absque hoc* that they refused to allow the plea; and upon that they joined in demurrer; and it was ruled, that the prohibition should stand. And there one reason for not granting a consultation was, that no place of the refusal was shewn, and therefore they could not try it. But the whole court upon the other point said, that notwithstanding this consultation was granted, because the refusal was traversable in this case, yet they agreed, that if he had prescribed *in modo decimandi*, or to be discharged of tithes, the refusal would then not have been traversable, because the spiritual court will not allow any pleas in discharge in such cases; for they say there it is *jus indelibile et non jus divinum*; but they will allow discharges which the statutes make. And so *Coke* concluded with declaring that the refusal is not traversable.

(a) Plowden's Rep.

GAWDY. You have cited the case of *Peykirk and Elmeton* to shew that the lessee shall be discharged: it is a good case, and it proves directly that the lessee of a parson may be discharged of tithes by prescription in the parson. Then as to the traverse, I hold that the refusal is not traversable, because it is but matter of surmise, and not the substance of the action. And for this I refer to the case of *Wimbish and Willoughby in the Commentaries*, 76. (a), where upon a surmise the plaintiff had the writ directed to the coroners; and the whole court agreed that he might in an assise, because the assise is the speediest remedy that can be, the jury coming at the first day, and therefore is to be favoured. But the reason why I cite this case is, that the party is not at any mischief, for the other party has no remedy for this, it being but matter of surmise, and not of substance, and therefore not traversable. So here, though the allegation of refusal were true, we could not grant a prohibition upon it; but we grant the prohibition upon the body of the matter, whether the discharge be good, and the surmise is but matter of form, and so not traversable, any more than in a writ of *cosinage* the conveyance of the pedigree is traversable, because not matter of substance. For in all actions the substance of the action is traversable, and not that which is but mere form and matter of course. As in an action of trover and conversion, the conversion is not traversable, for that is not the cause of action (b), but the defendant ought to plead not guilty. So here, the refusal is not the substance of his complaint, but the discharge is the substance and ground of the prohibition; and because the spiritual courts will not allow of any discharge, we are there-

(b) Qu.

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fore used to grant a prohibition. I hold therefore the discharge to be good, and that the lessee may well take advantage of the prescription.

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FENNER agreed with GAWDY, that the prohibition lay in this case, and that the refusal is not the cause of the prohibition; for even if the spiritual court were to accept the plea, we should grant a prohibition, if the matter did not lie within their consuance, or if the party could not have right done to him there. And so if a party can shew sufficient matter for a prohibition, we are not to wait their leisure to see whether they will receive his plea or not. In this opinion POPHAM concurred, and they all agreed, that the prescription was good for the lessee for years, and that he might well enough take the benefit of the discharge.

At another day the case was moved again by *Tanfield*, who argued for a consultation, and said that Mr. Attorney had always stated the case to be, that the bishop and all his predecessors had holden the land discharged of tithes, but that the pleadings were not so; for it appears by them that the bishop had the rectory as well as the land, and that he and all his predecessors by themselves, their farmers and tenants at will, had holden the land discharged and privileged from the payment of tithes; and that would make a great difference, as it seemed to him: for he agreed that where the land is discharged of tithes by composition real, the lessees and farmers shall hold it discharged; but where the discharge is only from the payment of tithes by unity of possession in the hands of one who is capable of prescribing *in non decimando*, when the land goes out of those hands it shall pay tithes, and the privilege will not change with the land, for that would be to make a prescription *in non decimando* in a layman, which cannot be. And he put a case which was in the exchequer chamber by *English* bill in the 31st of *Eliz.* The queen had lands in her hands: it was holden by all, that she should not pay tithes. The queen made a lease for years: it was much questioned, whether the lessee should pay tithes; and a case was drawn, and the opinion of the justices was delivered; and at length, after great advice, it was resolved, that the lessee should pay tithes, and so it was decreed. And he said, that he could not see any difference between the cases; for the bishop having privilege *in non decimando* only by reason of his person, could not transfer that privilege to another. POPHAM said [185] to FENNER, that the case certainly was so; but they all said that, there was a great difference between the cases, for that the queen is only privileged by reason of her person.

POPHAM. It was formerly lawful for a man to pay his tithes to whom he pleased, provided he were a spiritual person: for the

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same reason a spiritual person may retain his tithes, and not pay them at all, and then the parson has no interest in them.

TANFIELD. It appears in our case, that the bishop has the rectory and the land, and this is manifestly the ground of the discharge.

GAWDY. Do you say *RATIONE INDE* he was discharged?

TANFIELD. No. — Whereupon the court agreed, that the prohibition should stand, and that no consultation should be awarded upon both points.

[*Here follows Lord Coke's Report.*]

Rep. In this case three points were moved: 1. Whether the said prescription for discharge of tithes was good or not. 2. Whether the plaintiff, being a layman, should take benefit thereof. 3. Whether the said traverse was good or no. And as to the first point, three things were considered: 1. Who were by the common law capable of tithes in perannuity, and who not. 2. Who was capable of a discharge of tithes at the common law, and who not. 3. How he who was capable of a discharge, might be discharged of tithes, *scil.* either by prescription, or by composition, &c.

As to the first it was resolved, that none by the common law had capacity to take tithes, but only spiritual persons, or a mixt person, and regularly no mere layman was at the common law capable of them, unless in special cases; for no layman but in special cases could sue for them at the common law in the spiritual court, *scil.* for the subtraction of them. See the books in 7 *E. 3. 5. 11 Ass. 9. 44 E. 3. 5. b. 10 H. 7. 18. a.* and 7 *E. 6. Dyer 84.* and the books in 43 *E. 3. 34. a.* and 44 *E. 3. 39. a. &* that a farmer of a parson may sue for tithes; but it appears that such farmer was a spiritual man, as vicar, &c. And so it was said by some are all the other books in 31 *H. 6. 11. a.* 35 *H. 6. 39. a. b.* 2 *E. 4. 15. a. b.* 6 *E. 3. 4. a. b.* 12 *H. 7. 24. b.* (in which in truth there are but opinions) to be intended: and if the common law had generally enabled a layman to be capable of tithes, the common law would have given him remedy for the recovery of them; but regularly a layman had no remedy for the subtraction of tithes, till the statute of 32 *H. 8. c. 7.* But see 29 *Ass. 75.* that the king was capable of tithes at the common law, for he was *persona mixta*, and his patentee also by his prerogative, as it there appears.

As to the second point it was resolved, that a mere layman who was not capable of tithes in perannuity, was notwithstanding capable of a discharge of tithes at the common law in his own land, as well as a spiritual man; for by the common law, the parson, pa-

tron, and ordinary might have discharged a parishioner of tithes in his land, &c. or the parishioner might have given part of his land to the parson for a discharge of tithes in the residue. And for proof thereof see the book in 8 E. 4. 14. a. 6. and Register 38. where it appears that a layman might be discharged of tithes at the common law; but a layman might be discharged of tithes at the common law by grant, or composition, as it appears in the said books, but not by prescription to be discharged of tithes; for it is commonly said in our books, that he may prescribe in *modo decimandi*; but not in *non decimando*, and the reason thereof is, because he is not, but in special cases, capable of tithes at the common law, and therefore without special matter shewed, it shall not be intended that he hath any lawful discharge. And for this reason, in favour of holy church, although it might have a lawful beginning, the law will not suffer such prescription in this case, to put it to the trial of laymen, who will rather strain their consciences for their private benefit, than yield to the church the duties which belong to it. And the law had great policy therein, for the decay of the revenues of men of holy church, in the end, will be the overthrow of the service of God and of his religion. And therefore it is recorded in history, that there were (amongst others) two grievous persecutions, one under *Dioclesian*, the other under *Julian* surnamed *Apostata*; for it is recorded, that one of them intending to root out all the professors and preachers of the word of God, *occidit omnes presbyteros*, but notwithstanding that, religion flourished, for *sanguis martyrum est semen ecclesiæ*; and yet the same was a fearful and grievous persecution: but the persecution under the other was more grievous and dangerous, because (as the history saith) *ipse occidit presbyterium*, for he robbed the church, and spoiled spiritual persons of their revenues, and took all from them whereon they might live; and thereupon in short time did follow great ignorance of the true religion and service of God, and thereby great decay of the christian profession; for none will apply themselves, or their sons, or any other whom he hath in charge, to the study of divinity, when they shall have, after long and painful study, nothing to live upon. And it was said, that if a prescription in *non decimando* should be suffered, the church would rather lose than gain in these days. And for this reason such prescription was not allowable. But a spiritual person who was capable of tithes at the common law in pernancy, may prescribe to be discharged of tithes generally; for as he may prescribe to have a portion of tithes in the land of another, so he may prescribe to discharge his own lands of tithes; for it is commonly said in our books, that before the council of *Lateran*, every man might have given his tithes to any ecclesiastical person he

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would, and that appears by the books aforesaid. And note, it is recited by the statute of 2 E. 6. cap. 13. that land may be discharged of tithes by prescription, but that cannot be in case of a layman, *ergo*, it ought to be in case of a spiritual man. *Vide* 10 Eliz. Dyer 277. The orders of the *Cistercians*, *Templars*, and *Hospitularii*, were discharged of tithes *sub modo*, *scil. quamdiu propriis manibus excoluntur*, &c. and 18 Eliz. Dyer 340. And as to the second point, the same dependeth upon the first, for if the lands of the bishop were discharged in his hands absolutely by prescription, then the demising thereof to a layman, cannot make the same chargeable which were discharged before; and in that it may be more beneficial to the bishop, for in respect of that he might reserve the greater rent, &c. And as to the third point, it was resolved, that the traverse was insufficient, for as it is said in 8 E. 4. 14. a. the spiritual court will not allow any plea in discharge of tithes, and therefore the refusal in such case is not material, for the party may have a prohibition before any such plea pleaded by him in discharge of tithes, and therefore in such cases the allegation of the refusal of the ecclesiastical judge, are rather words of course than of effect and substance. But in some cases the refusal is traversable, as it was adjudged *M. 30 and 31 Eliz.* in this court, between *Morris* and *Eaton*, where the case was, that *Morris* was sued by *Eaton* in the spiritual court for tithes; *Morris* alleged there, that *Eaton* had not read the articles according to the statute, and that the ecclesiastical judge refused to allow the same; and this refusal was traversable by the judgement of the court, for otherwise, upon such surmise, all matters might be prohibited in the spiritual court, although the spiritual judge do all that belongeth to law and justice. And in the same case, the party grieved may have remedy by his appeal; but in the other case of discharge of tithes, or *de modo decimandi*, the judges of our law well know, that the ecclesiastical judges will not allow such allegation, and so is the difference. Note, reader, a man may prescribe, that he and all those whose estate he hath in the manor of *Dale* in *Dale a tempore cujus*, &c. have paid to the parson of *Dale* for the time being, a certain pension yearly, for maintenance of divine service there, in contentation of all tithes renewing or arising within the same manor: and further prescribe, that he, and all those whose estate he hath in the said manor, time out of mind, have used in respect of the said pension so paid the parson, to have all the tithes accruing and arising within the said manor, or any part thereof, *scil. of all lands holden of the said manor, or parcel thereof*: and such prescription was adjudged good in the king's bench, *M. 39 and 40 Eliz. Rot. 199.* in an action upon the case between *Pigot* and *Hern*, in which case two points were

resolved for good law. 1. That in such special case, a lay person, owner of the said manor, shall sue for the tithes upon the special matter aforesaid in the spiritual court, for it shall be intended at the beginning the lord was seised of the whole manor before the tenancies were derived thereout, and then by composition or other lawful means, the lord should have all the tithes within the manor for the said pension paid to the parson; and the law intendeth, that at the beginning it was for the maintenance of divine service, and *pro bono ecclesiæ*, the reason of which intendment is the continual usage, *a tempore cuius, &c.* It was resolved, that upon this special matter alleged, a man may have tithes as appurtenant to a manor; for he prescribeth by a *que* estate in the manor, and therefore cannot have them in gross. But it was adjudged in *Winchcomb's* case, in this court, in a prohibition *Hill. 35 Eliz.* that a man cannot prescribe generally in him and all those whose estate he hath in such manor, to have any tithes appertaining to the same; for without such special matter shewed, tithes which are spiritual things, and due *jure divino*, for the subtraction of which, remedy lieth only in the spiritual court, and no remedy at the common law, cannot be parcel or appurtenant to a manor, or any other temporal inheritance.

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PROHIBITION for tithes. *Popham* said, If land be overflown with water, and afterwards gained by industry, tithes shall presently be paid thereof, although it had been overflown time whereof, &c. (a) So, if land be full of thorns and bushes, from time whereof, &c., and it be grubbed up and made meadow, or arable land, tithes shall be presently paid thereof, notwithstanding the statute 2 *Ed.* 6. For those lands of their own nature were not barren, but by negligence, or ill husbandry became so. And the statute doth not intend that tithes shall not be paid within seven years after the manurance, &c. but of such land as was merely barren, and made good by foldage, or other industrious means. And this was agreed by the other justices. (b) He also said, That it hath been here adjudged, that tithes shall not be paid for rakings, unless they be foul rakings. The prescription also was, That he used to pay 1*l.* for every milch cow, in satisfaction for the tithe of milch kine and beasts agisted, which was moved not to be a good prescription: for tithes for one thing cannot be tithes for another.

Land drained or grubbed, shall pay tithes presently.
Moore 909.
S. C. S. P.

Tithes shall not be paid but for foul rakings.
Moore 909.
Goldsb.
147.
S. C. S. P.

(a) See *Anon. ante*, p. 166, and *Polles v. Saunders*, *ante* p. 138. n. *Stockwell v. Terry*, 823, *post.* *Gawden v. Gilbert*, 1 Wood, 89. *Alcock v. Halyard*, *ibid.* 279.

(b) *Stockwell v. Terry*, 1 Ves. 115. *post.* 823.

Hutchins v. Maughan, *post.* 1197. *Jones v. Le David*, *post.* 1338. *Byron v. Lamb*, *post.* 1594. *Warwick v. Collins*, 2 M. & S. 349. *post.* vol. 2. *Lord Selous v. Powell*, 6 Taunt. 297, vol. 2. *post.* *Kingmill v. Bellingsley*, 3 Pri. 463, vol. 2. *post.*

1596. But, if he had prescribed, that he had paid 1*d.* for all cows and beasts agisted, that peradventure had been good: and this diversity was so ruled in the case of *Dr. Lewes*; and of that opinion were the court here. Then *Godfrey* moved, that no tithes by the law are payable for beasts agisted, and so is *Nat. Br. 58*. But all the court held, that for beasts agisted for hire, or for dry cattle which are depastured to be sold, tithes shall be paid: but for dry cattle reared for the plough, or to be expended in the house, no tithes shall be paid. *Sed adjournatur. (a)*

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No tithes
for dry cat-
tle reared
for the
plough or
house.

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or,

The Archbishop of *Canterbury's Case*. [2 Ob. 46.]

[190] IN a prohibition in the *Queen's Bench*, between *Green* and *Balser*, the case was as follows: there was a religious college in *Maidstone*, to which the rectory of *Maidstone* was impropriate; and the college had divers lands and tenements within the said parish of *Maidstone*, and all was given to the king by the statute of 1 *E. 6*. Afterwards the rectory was conveyed to the bishop of *Canterbury*, and the lands, parcel of the possession of the said college, were conveyed to the lord *Cobham*; and now the farmer of the lord *Cobham* brought a prohibition against *Balser*, farmer of the said rectory under *Whitgift*, archbishop of *Canterbury*, and alleged the branch of the statute of 31 *H. 8*. concerning discharge of tithes, and shewed, that the master of the said college was seised of the said lands, and of the said rectory, *simul et semel*, as well at the time of the making of the act of 31 *H. 8*. as of the making of the said act of 1 *E. 6*. and held them discharged of tithes; and shewed the said act of 1 *E. 6*. by which the said college was given to king *E. 6*.; whereupon the defendant demurred in law. And in this case divers questions were moved.

1. Whether the said college came to the king as well by the statute of 31 *H. 8*. as by the statute of 1 *E. 6*. for if this college came to the king by the statute of 31 *H. 8*. then without question the said branch of the said act concerning discharge of tithes, extends to it; and it was objected by the plaintiff's counsel, that the words of the said act are general, *sc. That all monasteries, &c. colleges, &c. which hereafter shall happen to be dissolved, &c. or by any other means come to the king's highness, &c. shall be vested, deemed, and judged by authority of this parliament in the very actual and real*

(a) On the last point, see *Roll. Abr. p. 647. post p. 1582. Bun. 3. contra, Williamson v. Lord pl. 10. Hele v. Bragg, post p. 861; Ibid. Robinson v. Tunstall, n.; Underwood v. Gibbon, Lonsdale, 5 Pri. 25. vol. ii. post.*

possession of the king, &c. And when this college came to the king by the statute of 1 E. 6. it came to the king within these words of the act (*by any means*). But it was answered by the defendant's counsel, and resolved by the court, that that could not be, for several reasons.

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of Canter-
bury's Case.*

1. When the statute speaks of dissolution, renouncing, relinquishing, forfeiture, giving up, &c. which are inferior means, by which such religious houses came to the king, then the said latter words (*or by any other means*) cannot be intended of an act of parliament; which is the highest manner of conveyance that can be; and therefore the makers of the act would have put that in the beginning, and not in the end, after other inferior conveyances, if they had intended to extend the act thereunto. But these words (*by any other means*) are to be so expounded, *scil.* by any other such inferior means. As it hath been adjudged, that bishops are not included within the statute of 19 Eliz. cap. 10. for the statute beginneth with colleges, deans and chapters, parsons, vicars, and concludes with these words, *and others having spiritual promotions*; these latter words do not include bishops, *causa qua supra*. So the statute of West. 2. cap. 41. the words of which are, *statuit rex, quod non abbates, priores, custodes hospitalium et aliarum domorum religiosarum, &c.*; these latter words do not include bishops, as it is holden 1 & 2 Phil. & Mar. Dyer 109. for the cause aforesaid.

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2. The said clause of 31 H. 8. enacts, that the said religious houses shall be in the king by authority of the same act; and the statute of 1 E. 6. enacts, that all colleges, &c. shall be by authority of this parliament adjudged and deemed in the actual and real possession of the king; so that the latter parliament being of as high a nature as the first was, and providing by express words that the colleges shall be, by authority of the said act, in the actual possession of the king, the said college cannot come to the king by the act of 31 H. 8. It is said in 29 H. 8. *parliament et statutes, Br. 73.* if lands be given to tenant in tail in fee, his issue cannot be remitted, for the latter act takes away the statute *de donis, &c.* 3. The usual form of pleading such possessions as came to the king by the statute of 1 E. 6. and by the act of 31 H. 8. doth manifest the law clearly, *scil.* to plead surrender or relinquishment, &c. *virtute cujus ac vigore* of the statute of 31 H. 8. the king was seised; but to plead the act of 1 E. 6. of chauntries, *virtute cujus ac vigore* of the statute of 31 H. 8. was never heard or seen. And for all these causes it was resolved, that this college came to the king by the act of 1 E. 6. and not by the act of 31 H. 8.

The 2d question was, forasmuch as the said college came to the king by the act of 1 E. 6. and not by the act of 31 H. 8. Whether the said branch of discharge of tithes extends to such colleges as

A college
given to the
crown by
the statute

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of 1 E. 6.
 is not en-
 titled to an
 exemption
 from tithes
 under the
 31 H. 8.

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came to the king by any other act and not by the act of 31 H. 8. And it was objected, that the said branch should extend to colleges which came to the king by any other act: for it was said, that although the preamble of the said branch saith, *the late monasteries, &c.* yet this is not literally to be understood of monasteries only which were dissolved before the act, for (*late*) is to be construed according to the body of the act, *sc.* of those which were dissolved before, or which should come to the king afterwards by the said act; so that when they are dissolved, and in the king by force of this act, this act may call them (*late*) *quod fuit concessum per curiam*. Also, they said, that the words of the branch itself are general, *scil.* *any monasteries, &c. colleges, &c.* without any limitation; so that they conceived, that the words of the said branch made for them, and that this clause of discharge should extend to all monasteries, *&c. colleges, &c. quæcunque*, by what means soever they came to the king; and they said, that the intent of the act was so, for the intent of the act was to benefit the king and to make the subject more desirous of purchasing them, *&c.* Against which it was said by the defendant's counsel, and resolved by the court, that neither the words, nor the meaning of the said branch, did extend to any monasteries, *&c.* but to those only, which came to the king by the act of 31 H. 8. for it would be absurd, that the branch of the act of 31 H. 8. should extend to a future act of parliament, which the makers of the act of 31 H. 8. without the spirit of prophecy, could have no foreknowledge of; but this clause of discharge of tithes, shall extend only to those possessions which came to the king by the same act. And where it was said, that the first words of the branch were general, the same is true; but the conclusion of that branch is *in as large and ample manner as the late abbots, &c.* So that (*late*) being so intended, as it hath been agreed on the other side, *scil.* only of religious houses which came to the king by 31 H. 8. it is clear, that that branch cannot extend to this college, which came to the king by the act of 1 E. 6.

Qu. As to
 the general
 allegation
 of unity of
 possession.

The 3d question was, admitting that the said college had come to the king by the statute of 31 H. 8. whether such general allegation of unity of possession of the rectory, and of the lands in it, was sufficient. And it was resolved by the court, that it was not sufficient; for no unity of possession shall be sufficient within the same act, but a lawful and perpetual unity of possession, time out of mind, as it was adjudged *M. 34 and 35 Eliz.* in a prohibition between *Valentine Knightly*, esquire, plaintiff, and *William Spenser*, esquire, defendant, where the case was as follows: the plaintiff in the prohibition shewed, that *Philip Abbot*, of *Evesham*, and all his predecessors, time out of mind, were seized as well of the rectory

improper of *Badby cum Newnam*, in the county of Northampton, as of the manor of *Badby cum Newnam*, in *Badby* aforesaid, in his demesne as of fee, in the right of his monastery, *simul & semel*, until the suppression of the same monastery; *quodque ratione inde*, the said abbot, and all his predecessors, until the dissolution of the same monastery had holden the said manor discharged from the payment of tithes, until the dissolution of the same house, and shewed the branch of the statute of 31 H. 8 concerning discharge from the payment of tithes, and conveyed the said manor to *Knightly*, and the said rectory to *Spencer*, who libelled in the spiritual court for tithes of the demesnes of the said manor, against *Knightly*, who, upon the matter aforesaid, brought the prohibition; and it was adjudged, that the prohibition was maintainable; for the said branch of the act of 31 H. 8. was made to prevent two mischiefs; one, that otherwise all the impropriations of rectories to houses of religion had been disappropriate; for if the body to which the rectory is appropriated had been dissolved, the impropriation to such body had been dissolved also, as appears by 3 E. 3. 21 E. 14. 1. a. 21 H. 7. 4. b. F. N. B. 33. k. l. Another mischief was, that whereas many religious persons were discharged from the payment of tithes; some by their order, as the *Cistercians*, *Templars*, *Hospitallers* of *St. John's of Jerusalem*, as appears by 10 Eliz. *Dyer* 277; some by prescription, some by composition, some by the pope's bulls, &c.; and the greater part of religious houses, as the said abbey of *Evesham* was, were founded before the council of *Lateran*, and before time of memory; it would be infinite, and in a manner impossible by any search to find all the discharges and immunities which such religious houses had; and therefore also the said branch was made. And the great doubt in the said case was conceived upon this word (*discharge*); for it was said, that unity of possession was not any discharge of tithes, and by consequence was not such discharge as was within the intent of the said act. And for the force of this word (*discharge*) 18 E. 3. Bar. 247. 35 H. 6. 10 b. 22 E. 4. 40. b. and 6 H. 7. 10. b. were cited. But as to that, it was resolved by the court:

1. That the statute doth not say discharge of tithes, but discharge of payment of tithes.

2. The statute doth not say, discharge of payment of tithes, absolutely, but as freely as the abbot, &c. held it at the day of dissolution; and then this word (*discharge*) being referred to a certain time, may be intended of a suspension by unity. As, if a man seised of a rent disseises the tenant of the land, and makes a feoffment with warranty, the feoffee shall vouch as of land discharged of the rent, and yet the rent was but suspended; but every suspension is a discharge for a time, and the discharge being referred to

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or,
Archbishop
of *Canter-*
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1596. the time of the warranty, extends to the suspension. *Quod vide* 30 E. 3. 90. 3 H. 7. 4. a. 21 H. 7. 9 a. 5. R. N. B. 135. c.

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v.
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or,
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3. The statute saith, *as freely as the abbot, &c. retained the same.* And it was said, that it was the intent of the king, and of the makers of the act, to discharge the land of payment of tithes in such * case of unity of possession, being a general case, to induce purchasers the rather to purchase the land for greater prices.

4. For the infinite impossibility, and the impossible infiniteness, as hath been said, all the discharges which such religious houses had, could not be known; and the same construction was made in this court, Hil. 24 Eliz. in a prohibition between *John Rose*, and *William Gurling*, for tithes in *Flixton*, in the county of *Suffolk*. See 18 Eliz. Dyer 349. the parson of *Peykirke's* case. And it was likewise resolved in the said case of *Knightly*, that nothing could be traversed but the unity, for *ratione inde, &c.* is but the conclusion and the judgement of the law upon the precedent matter; but it was also resolved, that if before the dissolution the farmers of the demesnes had paid tithes, &c. to the abbot, &c. then the intendment of the law by the reason of the said unity of possession (which ought to be time out of mind) that the land was discharged of the payment of tithes, will not hold place. For as *Bracton* saith, *Stabitur presumptioni donec probetur in contrarium.* But, if the lands were always occupied by the abbots, or demised over, and no tithes at any time paid for the same before the act, although the land be conveyed to one, and the rectory to another, yet the land is discharged of the payment of tithes: and if the farmers of the demesnes had paid tithes before the act, the same should be pleaded by the defendant in the prohibition, and issue thereupon might be taken, as it was in the like case, Trin. 38 Eliz. in this court, between *Edward Grevil*, esquire, possessor of the demesnes of the manor of *Nasing*, in the county of *Essex*, plaintiff, and *Martin Trot*, proprietor of the rectory of *Nasing*, defendant; where, against such unity of possession in manner and form aforesaid, alleged by the plaintiff in the abbot of *Waltham*, and his predecessors, &c. in the rectory and demesnes, and with like conclusion as aforesaid, the defendant alleged payment of tithes by the farmers of the said demesnes, (without any traverse by the rule of the court), and issue was joined thereupon, and it was tried against *Trot*, and therefore the prohibition stood. And it was likewise resolved, That although the plaintiff in the case at bar alleged, that the master of the said college, at the time of the making of the said act of 1 E. 6. held them discharged of tithes; and although the lands of such religious persons may be discharged of tithes by prescription, as it hath been late adjudged in the case of

Supra 136.

Infra 208.

one *Wright* in this court, or by composition, &c. yet such general allegation that he was discharged of tithes, was not sufficient, without shewing how he was discharged, either by prescription, composition, or other lawful means. But, if the land had come to the king by the statute of 31 *H. 8.* then, by force of the said branch of discharge of the payment of tithes, such general allegation, that such prior, &c. held the land at the time of the dissolution of the said priory discharged of the payment of tithes, without shewing how, had been sufficient, and so is the common use in prohibitions.

The fourth question in the case at bar was, whether any house which was ecclesiastical, and not religious, as bishops, deans and chapters, archdeacons, and the like, shall be within the act of 31 *H. 8.* for no house within the act of 31 *H. 8.* is said religious, but such as was regular, and consisted of such persons as had professed themselves, and vowed three things, that is to say, obedience, voluntary poverty, and perpetual chastity; and those are called in our law, dead persons in law. For after such profession their heirs shall have their lands, and their executors or administrators their goods, and that was called *status civilis*: which was the reason that when a lease for life was made, the *habendum* always was, To have and to hold to him *durante vita sua naturali*; for it was then taken, that if the *habendum* had been *durante vita sua* (without saying *naturali*) the civil death, that is to say, the entry into religion had determined it. But it was resolved by the court, that no ecclesiastical house, if it be not religious, is within the act of 31 *H. 8.* for divers reasons.

1. The words of the act are always through the whole act in the copulative, *religious and ecclesiastical*; so that if it be ecclesiastical only, it is out of the act.

2. The makers of the act gave the king as well those religious and ecclesiastical houses which were dissolved, &c. as those which should be afterwards dissolved; but none were dissolved before the act, but only religious houses, and no house ecclesiastical only; for no bishopric, deanery, archdeaconry, &c. or such like ecclesiastical and secular corporation, was dissolved before; therefore no ecclesiastical house which was not religious (which after the act shall be dissolved) was within the intent and meaning of the said act.

Thirdly, It is enacted by the statute of 31 *H. 8.* that all religious and ecclesiastical houses, which after shall be dissolved, &c. shall be in the actual possession of the king, in the same state and condition as they were at the time of the making of the said act, upon which clause of the statute it was adjudged, *Pasch. 5 Eliz.* [196] *Rot. 1029.* (a) reported by serjeant *Bendloes*, and *Mic. 6 and 7 Eliz.* (a) p. 132.

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Dyer 291. and *Plow. Comm.* 207, (a) that if an abbot after the said act grants the next avoidance of an advowson, or makes a lease for years, and afterwards surrenders, so that by the act, the possessions of the abbey ought to be in the king, in the same state and condition as they were at the time of the making of the act; and at the time of making the act the land and the advowson were discharged of all interests, for this reason it was adjudged in both cases, that the lease and the grant were void by the said act. But, if a dean and chapter, and other such ecclesiastical and secular corporations should be within the said act, then, if they should surrender their possessions, they would avoid all their own grants and leases, which would be dangerous. And that was one principal reason that the colleges, chanteries, &c. which came to the king by the act of 37 *H. 8.* or 1 *E. 6.* should not vest in the king by the act of 31 *H. 8.* for the mischief before, for avoiding their leases, grants, &c. And to conclude this point, it was held in the common pleas in *Parret's case*, concerning the priory of *Frideswide*, that if the house be not religious and regular, it is not within the act of 31 *H. 8.*

And as to the opinion of 10 *Eliz.* *Dyer* 280. *Corbet's case*, concerning the priory of *Norwich*, it seems that that differs much from other deans and chapters, for the dean and chapter of *Norwich* were once religious, for they were prior and convent before; and yet that case was denied by *Popham*, chief justice, and some other of the judges, for the reasons and causes aforesaid.

Fifthly, It was holden by the court, that although it is provided by the statute of 1 *E. 6.* that the king shall have the lands of the colleges, &c. in as ample and large manner as the said priests, wardens, &c. had or enjoyed the same, that these general words should not discharge the land of any tithes, for they are not issuing out of land, but are things distinct from the land. For as the book is in 42 *E. 3.* 13. *a.* the prior shall have tithes of land against his own feoffment of the same land; and it is no good cause of prohibition to allege unity of possession in a college which came to the king by the statute of 1 *E. 6.* as a man may by the statute of 31 *H. 8.* in an abbot, prior, &c. as is aforesaid; for the statute of 1 *E. 6.* hath no such clause of discharge of payment of tithes, as the statute of 31 *H. 8.* hath. And therefore such perpetual unity, as hath been said before, will not serve upon this act of 1 *E. 6.* And afterwards a consultation was granted: and another consultation was granted the same term in another prohibition sued upon the same matter, between *Green* and *Buffken*. (b) And *Law-*

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(a) *Stradling v. Morgan.*

(b) This case of *Green v. Buffken* is reported

by Moore, under the name of *Green v. Boschin*, which report, as it materially differs in some part

rence, Tanfield, and others, were of counsel with the plaintiff, and the attorney-general and others with the defendant. 1596.

M. 39 & 40 Eliz. A. D. 1597. B. R.

Blincoe v. Barksdale, Vicar of *Marston*. [Cro. Eliz. 578.]

PROHIBITION: upon demurrer the case was as follows. A parsonage was appropriated in the time of king *Hen. 3.* to a priory, and at the same time a vicarage was endowed in these words: *salva vicaria, quæ consistit in alteragio, et in minutis decimis totius parochiæ prædictæ ad ecclesiam prædictam spectante. Et ulterius, si contigerit ipsos monachos in propriis usibus instauramenta habere, infra parochiam prædictam; quod tunc ipsi a præstatione decimarum omnino immunes essent.* At the time of which appropriation, there were six yard lands of the parsonage's glebe within the same parish; which parsonage came by the statute of 31 *H. 8.* at the dissolution, (being then in the prior's hands discharged *de minutis decimis*,) to the said king in the same manner: and the king granted those six yard lands to the plaintiff's ancestor in fee, from whom they descended to the plaintiff. And for the small tithes of those six yard lands the vicar sued, and the plaintiff brought the *prohibition* containing all this matter. And it was thereupon demurred. And, on the plaintiff's part it was argued, that by this endowment of the vicarage no tithes shall be paid unto him of the glebe of the parsonage, *quomvis dotatio sit de minutis decimis totius parochiæ*; and this land is parcel of the said parish: for, at the time of the endowment, this land was not tithable. And the very point was adjudged in this court 32 *Eliz.* betwixt *Yong.* and *Core*; that no tithes should be paid for glebe land. *Coke*, attorney general, *e contra*; for the endowment is *de minutis decimis totius parochiæ*; and this land is within the parish, and therefore tithes shall be paid,

A vicar under an endowment of all small tithes of the parish, is not entitled to the small tithes of the parson's glebe. Cro. Eliz. 479. Moore 457. 910. S. C.

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from what my lord *Coke* has here stated as the unanimous resolution of the court, I have thought it proper to subjoin. After stating the case, *Moore* says, " Three points were conceived by the justices. 1. If the colleges should be now said to be given to the crown by 31 *H. 8.* or 1 *E. 6.* And all the justices were clear in opinion that the king has them by 1 *E. 6.* because that is the last statute, though there be no negative words in it (that is) that he should have them by that statute, and no other. The second was, if the king shall have the lands by 1 *E. 6.* and be discharged of tithes by 31 *H. 8.* so that he shall take the tithes by the first statute, and the lands by the last, because the last does not give the tithes, though it has words that the king should have the lands in as ample manner and form as the colleges; which words do not extend to tithes, but only to the estate in the land. And of this the justices doubted. It seemed to *Popham* and *Fenner*, that by the statute of 31 *H. 8.* he should hold the land discharged which he had by 1 *E. 6.* *Gawdy* *è contra*. *Ideo quarre.* The 3d point was, if unity, without composition or prescription, were a sufficient discharge of tithes by 31 *H. 8.* And they all agreed that it was. But *Gawdy* said, that there ought to be a unity of the parsonage and land in the religious persons from time whereof the memory of man runneth not, &c. before the dissolution. *Popham* and *Fenner* *è contra*; for if there be a perpetual unity in fee of the rectory, and in fee of the land at the time of the dissolution, that is sufficient by the statute of 31 *H. 8.* and no consultation had ever been granted out of the king's bench upon a perpetual unity." Moore 420.

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thereof. But, as long as it continues in the parson's hands, no tithes shall be paid thereof; because the *Levite* ought not to pay tithes to another *Levite*: but, when the glebe land is conveyed into the hands of a layman, as here it is, it shall be otherwise. And therefore, if a parson had let his glebe land, the lessor should have the gross tithes from his lessee, and the vicar should have the small tithes. And therefore it was ruled of late in the exchequer, in one *Griesley's* case, where certain glebe land upon the endowment was allotted to the vicar, and all the small tithes within the parish; that he should not now pay tithes of that land: but, if he had leased it over, his lessee should have paid gross tithes to the parson, and small tithes to the vicar his lessor: so here the parson himself shall be discharged; but, in regard the plaintiff hath not the parsonage, but the land only, he shall pay tithes. But all the justices held clearly, that tithes shall not be paid in this case: for the vicar cannot by this endowment demand small tithes of the glebe land of the parsonage; but he shall have the small tithes from all the parish, where they were due at the time of the endowment; but that was not of the parson's glebe land: *ergo, &c.* But an endowment by express words of *minuta decima* of the glebe land of the parsonage might well have been, and then the parson himself should have paid them to the vicar. (a) And *Popham* said; this clause *et ulterius, si contigerit, &c.* was put into the endowment for the benefit of the priory, to discharge them from the payment of tithes for any land which they should have by purchase, as long as they held it in their own hands. And they all held, as it was discharged from the payment of tithes in the hands of the priory at the time of the dissolution; so the plaintiff now, having the same part of land by letters patents from the king, shall be discharged by the statutes of 31 H. 8. and 32 H. 8. from the payment of tithes for ever after against the grantee of the parsonage, and all others, in regard it was discharged at the time of the dissolution. And *Popham* said; the difference would be, whether the discharge were by reason of the persons who were to pay tithes, as the order of *Cistercians, &c.*, then the patentee should pay tithes: but, if the land were discharged from the payment of tithes by reason of a unity, it shall then be discharged by the statute in the hands of the patentee; for that privilege runs with the possession. Wherefore it was adjudged for the plaintiff.

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Land discharged of payment of tithes in an abbot's hand, at the time of the dissolution, is always discharged by 31 H. 8.

(a) *Moore* adds, "Note also, that it ought to be ancient glebe at the time of the endowment."

M. 39 & 40 Eliz. A. D. 1597. B. R.

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Somerton v. Doctor Cotton, Parson of Finchley. [Cro. Eliz. 587.]

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v.
Doctor
Cotton.*

In a prohibition for tithes of wood, it was surmised, that within the parish there is a custom, that all the parsons of the said church, time whereof, &c. *habuerunt, et gavisii fuerunt* such land, parcel of the manor of *Finchley*, in recompence of all tithe of wood within the said parish. And it was hereupon demurred. *Harris* serjeant, moved, that this prescription was not good: for the lands now in question, whereof tithes are demanded, were not averred to be parcel of the manor; and then the land, parcel of the manor, cannot be said to be a recompence for all the other lands within the parish, wherewith the lord of the manor hath nothing to do. *Popham*; it may be, that, at the beginning, all the land within the parish was parcel of the manor, and that then this allowance of the profits of this land was allotted in discharge of tithes of all the wood within the same parish; and, that, at the first, it was all the land of the allotter. Wherefore it was adjudged for the plaintiff, by the assent of all the justices. *Hill*. 40. *Placito* 5.

The parsons having land, parcel of the manor of *D.* in recompence of all tithe wood in the parish of *D.* is a good prescription in discharge.

M. 39 & 40 Eliz. A. D. 1597. B. R.

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Pigot v. Heron. [Moore 483.]

In an action of trover and conversion, the plaintiff declared, that he, 20 Octob. anno 36 reg. apud London, in warda de Cheap, possessionat' fuit de 20 carectat' tritici in garbis, 40 carectat' siliginis in garbis, 20 carectat' hordei in cocks, 40 carectat' avenarum pro decimis a novem partibus separatis et eject' granorum in Harley infra parochiam de Ovingham in comitatu Northumb. ut de bonis suis propriis, et sic possessionat' 21 Octob. anno 36 casualiter amisit apud London et eodem die depener' per invent' ad manus defend', qui sciens, &c. in usum proprium disposuit 22 Octob.

A custom for the lord of a manor to pay 6l. in satisfaction of all the tithes of the manor, and in consideration of such payment to take the tenth shock, &c. is good. Cro. Eliz. 599. S. C. by the name of *Pigot v. Herne*. Moore 589. S. C. cited.

The defendant pleaded in bar, that the king and queen *Philip and Mary*, seisit' de manerio de Prudehowe infra parochiam de Ovingham in comitatu Northumb. in fee in jure coronæ, et villat' de Harley existent' infra manerium de Prudehowe, infra villatis de Prudehowe et Harley infra manerium illud habetur consuetudo et modus decimandi (scil). quod domini manerii consueverunt solvere rectori ecclesiæ de Ovingham aut ejus deputat' sive firmat' annuatim ad festum Sancti Mich. vel postea super requisitionem sex libras apud ecclesiam de Ovingham in plenam satisfactionem et exonerationem omnium decimarum granorum infra villat' de Prudehowe et Harley, quas sex libras rectores acceptaverunt per totum tempus, &c. in satisfactionem omnium decimarum granorum, &c. Et ulterius, quod domini manerii per totum tempus consueverunt capere decimam garbam et cumulum grano-

1597. *rum infra villat' predict' crescen' in satisfactionem solutionis dict' 6 lib.*

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The plea then conveyed the manor to the now earl of *Northumberland*, by patent and descent, and by the same patent the tithes, by the name of all hereditaments in *Prudehowe, Ovingham, Harley, &c.* and there was an averment, that the earl had paid the 6*l.* annually to the farmers of the rectory, and *paratus fuit in festo Sancti Mich. ultimo ad solvend' et adhuc paratus est*; and that the tithes being severed, the earl was possessed thereof until one *Halsoe* took them, from whom *Heron*, as the servant of the earl, took them, and was so possessed thereof until the earl at *London* gave them to him, which is *eadem invent'*; and then there was an averment that *Harley* in the declaration, and the vill of *Harley* in the plea, and *Hirlaw*, otherwise *Harlaw*, in the letters patent, are all one.

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The plaintiff replied, that he was seised in fee of the rectory before the tithes came to the hands of *Heron* the defendant, and being so seised, the tithes were severed from the nine parts, whereby he was possessed of them as of his proper goods, until the earl took them out of his possession at *Harley*, and that the earl was possessed thereof until *Halsoe* took them from him; and that *Halsoe* being so in possession gave them at *London* to *Pigot*, whereby he was possessed of them *ut de bonis propriis in priori jure*, and being so possessed 21 *Octob. anno 36*, casually lost them, whereby they came by finding to the hands of *Heron*, who converted them 22 *Octob.* whereupon he prayed judgement without any traverse. And upon this the case was argued, *East. 40 Eliz.* by *Lawrence Hyde* for the plaintiff, and *Francis Moore* for the defendant.

Hyde argued that the plea in bar was insufficient; because both of the prescriptions by which the defendant makes title to the corn are against reason and law. For as to the first; it is against reason and law, that one man should make a satisfaction to the parson for the tithes of another man; because the law charges the land and the occupier of the land with the tithes, and he who has not the land and is not in the occupation of it, cannot in reason pay the tithes of the land, and, consequently, cannot prescribe to pay a satisfaction for the tithes of it: wherefore he concluded, that the first prescription, that is, that the lord of the manor hath used to pay 6*l.* to the parson for the tithes of corn and grain within the whole manor, is against law and reason, he being occupier and tenant of only part of the land, and his free tenants of the other parts. The second prescription he took to be more unjust and against reason, that is, that the lord of the manor prescribes to take in consideration of his 6*l.* the tithes of all the corn and grain within the manor: for tithes are due only to spiritual persons, and a layman who cannot administer the sacraments and perform the functions of a minister is not capable of tithes; and for this he.

vouched several texts of the ecclesiastical law and canons of the church, and therefore concluded the bar insufficient.

Moore e contra; and he maintained both the prescriptions as they were alleged in the bar. As to the first, he said, that a prescription is a thing the commencement of which is before time of memory, and is unknown; yet if any reasonable intendment can be made of its commencement, the prescription is good. And it seemed to him that the commencement of this prescription is founded in reason; for the prescription is, that the lord of the manor hath used to pay 6l. in satisfaction of all the tithes of corn and grain within the manor; which is reasonable; for it may be intended, that when this manner of tithing began, all the land of the manor was in the hands of the lord in demesne before the grant of any freeholds or copyholds, in which case it was reasonable that he might pay money in satisfaction of all the tithes of corn and grain within the manor; and if so, then the land, and all the occupiers of it thereafter, should be discharged of all other tithe of the land into whose hands soever the land should come. As to the other prescription, it seemed also to be reasonable that the lord of the manor should, in consideration that he satisfied the parson for the tithes of the whole manor, take the tenth part of the corn from the other tenants within the manor: and in this respect the words of the plea are mistaken; for the prescription is not, that the lord of the manor hath had the *tithes* of all the corn and grain, but *decimam garbam et decimum cumulum*, which he may take as a temporal custom within his manor. For one may reserve by way of rent *decimam garbam*, or *quintam garbam*, or *medietat' granorum*, as 44 E. 3. fol. 5.; and if it may be good by way of reservation, it is also good by way of custom: as a heriot may be reserved and may be due by custom. And many much stricter customs between the lord and his tenants are allowed in our books: as 8 H. 3. *Fitzh. Prescriptions*, pl. 58. the church of *Hereford* prescribed to have the wardship of their socage tenants. And 15 E. 3. *Fitzh. Aide*, 33. the lord prescribes in lieu of marchet-service to have a fine when his tenant married his daughter. In 8 R. 2. pl. 117. *Aide de Roy*, in *Fitzh.* the lord prescribes that he hath used to distrain for a satisfaction if any one erected a fold within the vill, though it were not upon the lord's land. So 11 H. 7. fol. 6. the lord prescribes to have 3l. for a pound-breach within the manor. The lord, therefore, may likewise prescribe in the principal case to have *decimam garbam et decimum cumulum*. But it seems, that though the second prescription should not be good, yet the plea in bar is well enough, and judgement ought to be given against the plaintiff. For the first prescription is sufficient to bar the parson of all tithes within

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1597. the manor; and therefore the tenants are discharged against the parson; and when they set out the tenth part of their grain, the property remains in themselves, and it is not due to the parson; then neither the parson, nor the lord of the manor, hath any right to this corn: and if so, it is to be seen and inquired which of the

[203] persons in question was first possessed of the corn, for he might detain it against the other, and if the other took it from him, he committed a tort: and therefore the plea is to be examined to this point; and by the plea it appears that the earl of *Northumberland* was possessed until *Halsoe* took them from him, and that *Heron*, the defendant, took them by the earl's order, and the earl then gave them to him. Which plea is confessed by the replication and demurrer; for if this were not true, the plaintiff ought in his replication to have traversed *absque hoc*, that the earl was first possessed, so that judgement ought to be against the plaintiff.

And all the justices were unanimous that both the prescriptions were good (a). They agreed also, that the first possession was confessed by the replication without any traverse to be in the earl of *Northumberland*, under whom the defendant claimed. And they also agreed, that the last prescription was not material, but that the first was a sufficient title for the earl. For which reasons they entered judgement against the plaintiff, if better cause should not be shewn before a certain day: at which day *Coke*, attorney, argued for the plaintiff; and *Tanfield* for the defendant. And *Coke* advanced nothing but this, that the defendant ought to have said in his plea in bar that the lord of the manor hath used to take *decimam garbam*, as appurtenant to his manor. But the whole court was against him; for the prescription in gross is well enough. He then prayed a further day to argue against the patent, for it seemed to him that it did not pass by the patent, *et ei conceditur*, so that it is now

[204] pending. But afterwards, *M. 40 & 41*, (b) it was adjudged for the defendant that the plaintiff *nihil capiat per breve vel billam*, for the reasons aforesaid. And note, it was affirmed in this case that the

(a) The judgment of the court is given more fully by *Croke*. As to the first prescription it runs pretty much in the words of Sir *Francis Moore*, the defendant's counsel. As to the other, he says, that it was the opinion of the court, "that it was good to have the tenth shock, &c. for he hath it as a profit *apprendre*, as parcel, or a thing appurtenant to his manor, and not as tithes. For a layman cannot have tithes by prescription, because he is not capable of them, in regard they are spiritual: but he may have the tenth shock as a temporal profit *apprendre*, as in 44 *E. 3. 5*. And it well may be parcel of a manor: otherwise of tithes, which cannot be said to be parcel of or

appendant to a manor, as was adjudged in *Winch's case*, 34 *Eliz.* and so is the book of 10 *E. 3. 5*. And therefore, if the lord had prescribed to have *decimas garbarum*, it had been ill; but, when he prescribes to have *decimam garbam*, &c. it is otherwise; for so there is a difference between the pleading for tithes, which are spiritual, and of a tenth, which is temporal." *Cro. Eliz.* 599.

(b) We find a report of this same case, as it should seem, under the name of *Pigot v. Simpson*, so late as *Trinity Term*, 42 *Eliz.* in *Cro. Eliz.* 763. when the court adhered to their former opinion upon both of the principal points.

king is *persona mixta*, and capable of tithes in pernaney by prescription, or in *non decimando*. (a) 22 Ass. pl. 75. 33 E. 3. Fitzh. Aide de Roy, 103. & 10 H. 7. 10.

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Leigh v. Wood.*

PROHIBITION to stay a suit for tithes, wherein it was surmised, that the plaintiff set forth his tithes, and afterwards, for some reasonable causes (not shewing what in certain) he had detained part of them; and that the parson had sued him for them in court christian: and it was thereupon demurred. And *Fenner* and *Clinch* held it to be good cause for a prohibition. For, by setting out the tithes, they are become lay chattels, for which he may have his remedy at the common law by trespass, or detainue, and therefore there is not any cause of suit in the court christian. *Gawdy* and *Popham* e contra. For against the party himself, who set forth his tithes, a suit is well maintainable in the spiritual court, if he detains them, although the parson (if he would) might have his remedy at the common law. But, if a stranger takes them after they be set forth, his remedy is only at the common law. And the statute of 32 H. 8. proves it. For the words thereof be, *if any do not set out, or do detain, or withhold his tithes*, (which is to be intended after they are set out,) *he shall be sued in the court christian*, &c. For otherwise mischief would ensue to the parson, in that he would secretly set his tithes forth, so as the parson should not know thereof, and would afterwards carry them away. *Et adjournatur*.

Qu. If for detaining tithes by the owner, after he set them forth, suit lies in the court christian.

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P. 40 Eliz. A.D. 1598. B. R.

Beadle v. Sherman. [Cro. Eliz. 608.]

DEBT upon the statute 2 Ed. 6. for not setting forth tithes, wherein the plaintiff declares, that he was parson of *Lytlington*, in the county of *Cambridge*, and that the defendant was a parishioner there, and had corn there growing, &c. the tithes whereof amounting to the value of 50*l*. he had not set forth: wherefore he demanded the treble value, viz. 150*l*. After verdict for the plaintiff, upon a *nihil debet* pleaded, it was moved in arrest of judgment, that the suit for this treble value ought not to be brought at the common law, but in the spiritual court, as it ought to be for the tithes before they are set forth. But *Tanfild* for the plaintiff moved, that it might be well brought at the common law. And so

Debt upon the statute for the treble value lies in the common law courts for not setting out tithes. Moore 912. S. C. Jenk. 279 S. C. 13 Co. 47. S. C.

(a) *Earl of Hertford v. Leech*, 494.

* *Moore*, in his account of this case, treats it as

agreed by the court, that the suit should be in the spiritual court. *Moore*, 912, pl. 1907.

1598. *Beadle v. Sherman.* it was ruled in the exchequer, upon great advice, in the time of *Manwood*, betwixt one *Wood* and *Halton*. For there the information was brought by the queen only upon this statute, and the treble value was demanded, and adjudged that it lay not: for the statute gives it to the party grieved, and not to the queen. And then it was brought by *Wood*, being the party grieved, and he had judgement to recover. And a precedent in this court, *Hil. 34 Eliz. Rot. 682.* betwixt *Wentworth* and *Crisp (a)*, was cited, where such an action was brought, and the plaintiff had judgement to recover. And all the justices were of the same opinion in this case: but because it was a new case, they would advise until next term.

[207] The case was moved again, [Tr. 40 *Eliz.*] to have the resolution of the court: and they all resolved, that the action well lay upon the statute. It was then moved, that those tithes were personal chattels, which appertained to the baron only (*b*), and he hath joined his feme with him in this action; and therefore it was ill. *Sed non allocatur*: for, the feme being termor, the baron is possessed of them in her right; and the action is given to the proprietor, or farmer, &c. wherefore the action is well brought in both their names. And it was adjudged for the plaintiff. Note; that a writ of error was brought upon this judgement. And the error was assigned in the point of law. And the judgement was affirmed.

M. 40 Eliz. A.D. 1598. B. R.

Barsdale v. Smith. [Cro. Eliz. 633.]

The tithe of hay shall belong to the vicar where he is endowed with *decimam garbarum*, if the usage has been so.

TRESPASS by a vicar, for taking two loads of hay, and carrying it away. The defendant pleads, that the place where, &c. is within the parish of *Maidstone*, whereof he is parson imparsonnee; and it was set out for tithes; and that he used to have *decimas garbarum, & fœni*. The plaintiff replies, and shews a composition in the time of king *Henry 3.* and that the vicarage was then endowed; which was, that the vicar should have *minutas decimas, & totam decimam garbarum* in *Watworth*, (which was an hamlet within the said parish, and the place where, &c. and was parcel of that hamlet,) and, that at all times, whereof, &c. he, and his predecessors (vicars there) had used to have the tithe of hay there; wherefore, &c. And it was hereupon demurred. *Tanfield*; by this prescription, he cannot have hay. For *garba* is always corn, and therefore this prescription cannot stand with the composition. *Coke e contra*: for as the usage hath been, so it shall be expounded (*c*). For it was adjudged in the exchequer, where a patent was made by king *John*

(a) *Moore* 912. pl. 1289. S. C. This action too was by baron and feme in right of the feme.

(b) *Jenkins* states the action as brought by the husband only, and yet held good.

(c) *Sims v. Bennett*, post. 883. 884. *Gumley v. Burt*, Bun. 169. post. 656. *Stephens v. Martin*, cited, *ibid*.

to one and his successors, that because *Bracton* saith, that anciently successor was taken for *hæres*, and that always since it had used to descend *jure hæreditario*, the heir should have it by that charter. Wherefore, &c. And all the court here resolved accordingly; for, in regard it was an ancient charter, and constantly had been used to extend to hay, the word *garba* might well extend thereto, although at this day it is commonly used in another sense. Wherefore it was adjudged for the plaintiff.

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M. 40 & 41 Eliz. A.D. 1598. B.R.

Chambers v. Hanbury. [Moore, 527.]

On a trial at bar in prohibition, the suggestion was, that the queen and all those whose estate she hath, have used to pay to the rector of *Kingswood* 2s. 4d. yearly in satisfaction of all the tithes of certain land, called *Cowley in Kingswood*, in the county of *Wilts*, upon which prescription the issue to be tried was taken. Upon the evidence it appeared, that the queen had the estate of the abbot of *Kingswood*, who was owner of the land, and also rector in fee in right of his abbey, whence it was inferred by *Williams* serjeant and *Francis Moore*, that the prescription was not proved on the part of the plaintiff, inasmuch as the abbot could not pay himself, nor can the queen, who has now the estate of the abbot; but the prescription ought to have been stated in this manner; that is, that when the queen demised the land, the occupiers had used to pay 2s. 4d. in satisfaction of the tithes. *Sed curia, viz. Popham, Clench, and Fenner, contra eos*; for they were clear that unity of possession is not a perpetual discharge of the tithes, nor of the recompence in lieu of them; and if so, then the retainer may be said to be a payment to himself. And accordingly, under this direction, the jury found for the plaintiff.

Unity of
possession
does not
destroy a
modus, for
the retainer
is payment.
Supra, 98.

M. 40 & 41 Eliz. A. D. 1598. B.R.

Benton v. Trot. [Moore, 528.]

In prohibition, the suggestion was, that the abbot of *Waltham Holycross*, from time whereof the memory, &c. before the dissolution, and *Robert* the abbot, at the time of the dissolution, were seised in their demesne as of fee of the manor of *Nasing*, and of the rectory of *Nasing, insimul et semel*; and that by reason of the premises, they held the manor discharged of tithes: that the abbot surrendered to the king, whereby, and by the statute of dissolutions, 32 H. 8. the king also held it discharged, for by that statute the king and his successors, and all others who should have abbey lands, should have, hold, retain, keep, and enjoy them discharged of payment of tithes as freely and in as ample manner and form as the abbots held and occupied them at the days of their dissolution, or com-

An abbot
seised of a
rectory and
manor
within it,
demised
both to one
person, who
afterwards
demised a
part of the
lands of the
manor to a
sub-tenant,
in whose
occupation
they were at
the time of

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the dissolution in 31 H. 8. and had been for four years, and had, during that period, paid tithes; it seems that these lands are not exempt from the payment of tithes by unity.

ing to the king's highness : the plaintiff then stated, that by another act in the same parliament, *no one shall be compelled to pay tithes for any lands which by the laws or statutes of the realm are discharged, or not chargeable with the payment of any such tithes* : and so he deduced the manor by conveyance of the inheritance and rectory to sir *Edward Denny* knight; but the manor was in jointure to his mother for life, who was married to *Grevil*, and the rectory was in lease to *Trot* the defendant, upon the demise of sir *Edward Denny*; and he pleaded a lease made by *Grevil* to him of the closes, called *Great Priestfields* and *Little Priestfields*, being parcel of the manor, and complained that *Trot* sued him in the spiritual court for the tithes of those closes : and he alleged further the statute of 2 and 3 E. 6. that *no one shall be compelled to pay tithes for any land discharged by the laws and statutes of this realm by lawful prescription, or composition, real, or not chargeable with the payment of any such tithes.*

Trot, the defendant, pleaded in bar, confessing the unity of inheritance, and that the abbot before and at the dissolution, held all such parcels of the manor as he held in his own hands discharged of the payment of tithes : but he pleaded further a lease made 7 H. 8. of the manor and rectory by the abbot to sir *Thomas Par*, who died in 8 H. 8. possessed of that term, which was for thirty years, whereupon *Matilda* his widow became possessed of it as executrix; and she, 29 H. 8. before the dissolution, demised the closes to *Gowch* and *Shelley* for four years, who before the dissolution paid the tithes in kind of the closes to *Matilda*, as farmer of the rectory, and they in 30 H. 8. before the dissolution, and at the time of the dissolution, paid the tithes in kind to the lord *Cromwell*, to whom *Matilda* had assigned her term; he then pleaded his own lease and the dissolution, as the plaintiff had alleged; and traversed, that *without this*, *Robert* the abbot held the closes discharged of the payment of tithes at the time of the dissolution, as, &c. To which plea the plaintiff demurred; and it was argued by *Forster* and *Coke*, attorney, with the plaintiff; and by *Francis Moore* and *Tanfield*, with the defendant.

The plaintiff's counsel made two objections to the plea, the one as to the matter, the other as to the form. As to the matter, that the plea admits unity in the freehold and inheritance of the rectory and the manor in the abbot at the time of that dissolution, and the division is only a severance for four years of the closes whereof the tithes are demanded, and the severance not made by the abbot, but by his lessee for years, who had the manor and rectory in lease. And since the statute of 31 H. 8. enacts, that all others shall hold the lands discharged of tithes in such manner as the abbot held them, and the abbot held the reversion discharged;

they thought that the lease being determined, the parties who now hold the land should hold it discharged, for the abbot must have retained it discharged upon the expiration of the lease. The objection as to the form was to the traverse, for it seemed to them that the traverse is superfluous, inasmuch as the unity is in manner confessed, and is avoided by the lease *in esse* at the dissolution, so that there was no need to traverse the discharge. And if the traverse be necessary, yet, as it is made, it is not good; for it is *absque hoc* that the abbot held discharged of tithes at the time of the dissolution, which is matter in law and not matter in fact.

The defendant's counsel maintained the plea, notwithstanding these objections. And as to the objection to the matter, they conceived that neither by the words nor by the intent of the statute of 31 H. 8. was any unity a discharge of tithes, except unity of the land and rectory in the abbot in his occupation together at the day of the dissolution. And for the better understanding of the law in this point, it is to be considered how tithes at the first began; and next, how many manners of discharge of tithes there were at the common law before the statute; and, thirdly, the words and intent of the statute as to unity being a discharge under it. First then, by the law of God, the laity were commanded to give a portion of their substance to spiritual persons for the exercise of their functions, as appears in the sixth chapter of *St. Paul to the Galatians*, *Let him that is instructed in spiritual things depart of his goods to him that instructeth him*. Now what part or portion he should depart with was uncertain, until the church apportioned it after the example of the priests of the old law, who used to give the tenth part, as appears by the judicials of the Jews, which was founded upon the vow of *Jacob*, in the 28th chapter of *Genesis*, that if God prospered him in his journey, he would give the tenth part of all he had, as the *Doctor and Student* writes in the last chapter. (a) And after that the portion to be given was certainly known to be the tenth part, yet the person to whom it was to be given, was uncertain. And every temporal person might have given his tithes to any spiritual person whomsoever, having cure of souls, he pleased, before the council of *Lateran*; (b) and thence it happened that several portions of tithes issuing out of land within different parishes were found in the inheritance of religious houses, as being given to them before that council. But that council restrains men from giving the tithes to any other than the parson of the parish within which they arise (the kingdom being divided into parishes), and thence it followed, that the ecclesiastical law gives suit against him who

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The modern translation of this passage, which is certainly the most correct, is as follows: *Let him that is taught in the word, communicate to him that teacheth in all good things.* I have not met with any translation precisely in the words in the text: the nearest to it is that of the edition of 1608.
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(a) Di. 2. cha. 55. (b) See Selden on Tithes, cha. 8. sect. 9. 23. Toller on Tithes, 9. 110. 2 Inst. 641. *contra*.

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106-7.

detains tithes from the parson of the church. But from this it manifestly appears, that tithes were from the beginning merely spiritual, and that no layman was capable of them. And to this purpose is 13 *H. 3. Fitzh. Prohibition*, pl. 20. If a parson sell his tithes for money, he shall sue for the money in court christian. And 3 *E. 3. Fitzh. Grants*, pl. 70. an appropriation of a parsonage to the templars was not grantable over to the hospitallers, as *Herle* says there, because the privilege of retaining tithes to their own use was annexed in confidence to their persons by the ordinary who made the appropriation, and is not transferable by grant from the one to the other, as temporal things are; for which reason an act of parliament was made to transfer these things to the hospitallers in the 17 of *E. 2.* as it appears. And in 44 *E. 3. 5.* it is ruled, that an assise does not lie for tithes, but that if the lord has reserved the *tenth part* of the corn or such thing, he shall have an assise of that, as of a profit *apprendre*. So in 7 *E. 6.* it appears from *Dyer* 83. [*supra*, 119.] that no temporal action lay for tithes, until the statute of 31 *H. 8.* gave them after the dissolution, and that the appropriated rectories and portions of tithes were given to the crown. Whereby it is proved, that though the abbots had temporal capacities to take land, and also spiritual capacities to take tithes, and though they had sometimes the inheritance in the land, and also the inheritance in the tithes which proceeded from that same land, yet those two inheritances were divided in them in respect of their several capacities *ac si essent in diversis personis*.

As to the discharge of tithes, there were three manners of discharge at common law. The first was prescription: the second, privilege: the third, unity. The discharge by prescription was *in non decimando*, and *in modo decimandi*. Spiritual persons only could prescribe *in non decimando*, and not temporal persons, unless for lands which they held as farmers to spiritual persons. And for this is the case of *Wright v. Wright*, in prohibition, *Hil. 38 Eliz. Rot. 628.* in the king's bench, [*supra* 167.] where the suggestion was, that the land was of the possessions of the bishop of *Winchester*, and the plaintiff prescribed that neither the bishop, his tenants, nor farmers, had ever paid any tithes for it from time immemorial; and adjudged a good prescription. So, the parson of a church may prescribe for his glebe in another parish. And so of all abbeys and religious houses; for because they were capable of tithes, they were capable of being discharged of tithes in their own land, and the commencement of the discharge is not examinable when there hath been a continual discharge from time immemorial, but it shall be intended to begin upon a reasonable cause. But this kind of prescription is not alleged in the prescription in the principal case; for it is alleged that the abbot was parson and proprie-

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tor of the land from time whereof the memory, &c. and that by reason of the premises he held the land discharged of the payment of tithes, &c. by which conclusion it appears that the reason and commencement of the discharge is unity; and against the plea of the party no other discharge can be intended or presumed, as it might be if it had alleged the prescription *in non decimando* without such conclusion. The prescription *in modo decimandi* is common to spiritual and temporal persons; and if land discharged *per modum decimandi* fall into the inheritance of a rector *in jure ecclesiæ*, this does not interrupt the prescription, but the retainer of what is due for the tithes shall be said to be a payment to the rector himself in order to continue the prescription in whose hands soever the land shall afterwards come upon its disjunction from the rectory, as was resolved upon evidence at bar in a prohibition in the case of *Chambers v. Hanbury*, [*supra*, 208.] The discharge by privilege is, where the pope, who formerly usurped the privilege of supreme ordinary, by bull granted the privilege of being discharged from the payment of tithes; but this was always to be made to a spiritual person who could take the cure of souls: as in 10 *Eliz. Dyer*, 277 b. [*supra*, 132.] the bull to the religious of the order of Cisterians privileged them that they should not pay tithes of the lands *quas propriis manibus excoluerunt*: and yet their lessees and farmers paid them. And many discharges were under such privileges in conditions and provisions contained in the bulls. The discharge by unity is more properly a suspension than a discharge; for the unity is of the land in a temporal capacity, and of the tithes in a spiritual capacity, both of equal estate of inheritance in one person, so that it is a discharge for the time of the payment of tithes from the necessity of reason, because he cannot pay tithes to himself; but, when the land is come into the hands of one, and the right to the tithes into the hands of another, in that case the necessity is removed, and the tithes are payable for the land. And the conjunction of both the inheritances in one person was not any perpetual discharge, because the capacities in which he took them were several, so that the spiritual thing could not extinguish in the temporal, as it would be of things temporal, such as rents, commons, profits *apprendre*, and the like. And this is proved by 30 *H. 8. Dy. 43.* where it is resolved by the justices and all the serjeants, that if a parson purchase land within the parish, and demise it for years, or make a feoffment of it, he shall have the tithes from his own lessee or feoffee. So, he shall for such land pay tithes to his farmer of the rectory, if he demises the rectory, and retains the land in his own hands. And according to this is 7 *E. 6. Bro. Dismes 17.* — We are now to consider the statute of 31 *H. 8.* the intent of which was founded upon this providence, *viz.* that as the

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legislature had now given to the king the lands of the religious persons, and the king could dispose of them to his temporal subjects, who were not capable of tithes, nor of such discharges of the tithes of lands, as the abbots had enjoyed; in order to avoid contention, and to encourage the purchasers of abbey lands, they were desirous of providing that the king, and all other persons who should have any abbey land, should hold it discharged from the payment of tithes in like manner as the abbots held it at the day of the dissolution; and according to this intent they inserted the said branch of discharge of tithes in the said statute of 31 H. 8. of the dissolution of monasteries: by which it is clear both in the letter and the intent that all lands which the abbots held discharged by the privilege of any bull, or by any manner of prescription, the king and every other person should hold for ever discharged according to the privilege and prescription: and also that where the abbots held at the time of the dissolution any land in their hands discharged of tithes by reason that they themselves were the persons to whom the tithes were payable, there the king and every other person should hold those lands discharged for ever, if the abbot had an equal estate in the land and tithes; and this by the words of the statute, *that they should retain and keep the land discharged as freely as the abbot, &c.* But, if the abbot were out of possession of the rectory or of the land at the time of the dissolution, so that tithes were then paid; then the land was not discharged at the dissolution, and therefore shall pay tithes perpetually. For where there is no discharge but unity, there the unity must be of the occupation of both together, and no other unity of estate was any discharge at common law, neither at the time nor before the dissolution, as is proved by the cases before cited, and is also expounded by the whole usage and experience since the statute, as appears from the case of copyholders of abbey lands where the abbots were also parsons; there, there was unity in the estate of freehold of the rectory and also of the copyholds, and yet the copyholders have always paid tithes since the statute: whence it should seem that unity of the freehold and inheritance without unity of the occupation of the land and rectory in the abbot in the principal case, is not such a discharge of tithes as is within the intent or letter of the statute. And if he who was lessee for years of both under the abbot, that is, of the land and rectory, had not leased out the land, it would be a great question if that land by such unity in the hands of the lessee for years should pay tithes. For the words of the statute are, that the king and his patentees shall hold them discharged as freely as the abbot held them the day of the dissolution; and if the abbot did not hold the land and rectory together in his occupation, he did not hold the land discharged of tithes at all: and whether the

holding of his farmer shall be said to be within the statute as if he had held them himself is doubtful.' But here the case is stronger, because the farmer had leased out the land and retained the rectory, and he took the tithes of the land at the time of the dissolution from the lessee of the land in right of the rectory, so that the land was neither then discharged, nor did the abbot then hold it; wherefore, &c. As to the matter of form, the traverse seemed to them to be good: 1st. because in the whole suggestion there is but one thing material and traversable, and that is the discharge at the time of the dissolution; and upon that the prohibition is founded, and therefore the defendant has traversed it. For if he were to traverse the discharge before the dissolution by unity time immemorial, that is not material, because admitting the unity time immemorial, it is not material if there was no unity at the dissolution: and if he were to traverse the unity in seisin at the time of the dissolution, that is, that the abbot was not seised of the land and rectory at the time of the dissolution, this would pass against him, because he was seised of an estate of freehold and inheritance in both. And therefore the defendant hath done well to confess such seisin, and to shew a severance in occupation, and that the land was out of the hands of the abbot by lease for years at the time of the dissolution.

1598.

Benton
v.
Trot.

Fenner, puisne justice, was with the defendant in both points, [215] viz. the matter in law and the traverse. *Garody* was with the plaintiff in both points. *Clench* and *Popham* were with the defendant as to the matter in law, and with the plaintiff for the insufficiency of the traverse. And *Popham* said, that unity of estate, and not of occupation at the day of the dissolution by the abbot, is no discharge of tithes within the statute. But, if the abbot at the time of the dissolution held the land in fee, and the rectory likewise, this land is always discharged; and this construction has been always made in this court upon the words of the statute, that the king *shall retain and keep the land as freely discharged, as the abbot held it the day of the dissolution*. And so it was ruled in the case of *Knightly v. Spencer*, [*supra* 192.] and in another case between *Green* and *Bosekin*, [*supra* 197.] and so also it was taken by the justices of the common bench. But as to the case of copyholders, he took it to be clear that they shall not be discharged; and if the abbey land were in lease for a year, or otherwise, at the time of the dissolution, and not in the proper manurance of the abbot, that land is not discharged by the unity of the freehold in him. And as to the traverse, he said that it is the matter in law which is traversed, whereas nothing is traversable but matter in fact: for the matter in fact is the unity, and the conclusion upon that is *by reason whereof* the abbot held discharged. And the traverse of the discharge is the traverse of the conclusion,

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v.
Trot.

whereas it should be of the unity, which is the matter in fact; and he confessed that unity from time immemorial, before the dissolution, is not material, but unity at the time: and if an abbot had purchased land and a rectory the very instant before the dissolution, and was seised of both in demesne and occupation at the time of the dissolution, he said that that land will always be discharged of tithes. And in the principal case it seems that the special matter would well enough have maintained the issue for the defendant against unity of seisin. (a)

M. 41 Eliz. A. D. 1598. B. R.

Green v. Hun. [Cro. Eliz. 702.]

Prescription to pay the 10th cock of the barley in discharge of the tithes of the rakings *involuntarily* dispersed, good.

* [216]

Modus to pay tithe wool at *Lammas-day*, good.

Custom to render no tithe for young cattle reared for plough or pail, good.

Custom to pay a *hearth-penny* for

In prohibition for suing for tithes of the rakings of barley, the plaintiff alleged a prescription to make the barley into cocks, and to pay the tenth cock in satisfaction of the tithes of the barley, and of the rakings *minus voluntariè* dispersed. And it was thereupon * demurred; because he did not aver, that those rakings were not *minus voluntariè* dispersed. For *Bacon*, who moved it, said, that in 31 *Eliz.* it was ruled in the common bench in one *Adams'* case, that a prescription to pay the tenth cock generally, in satisfaction of all rakings, was not good. For he might leave the greater part of the corn in rakings. But all the court held, that the prescription was good, and there needed not any averment; but that ought to come on the other part, if he would. Secondly, he sued for tithe of wool, and alleged a custom to pay it every year at *Lammas-day*; and that he set it out, &c. And it was thereupon moved, that it was not good; for this is not a *modus decimandi*: but for the time only, which is to be tried in the spiritual court. But the court held it to be good: for it is due *de jure*, when it is clipped; but by prescription it may be set out altogether at another day, and that is good. And if the spiritual court will not allow thereof, as it is here alleged that they will not, it is fit to prohibit them. Thirdly, he prescribed that for young cattle reared for the pail to be milch kine, or for the plough, no tithes have been accustomed to be paid: and it was thereupon demurred, and adjudged a good prescription; for they be for the public weal. And the parson is to have benefit of them in another kind. And it was held, that for pastures of such cattle no tithes are due for the reason aforesaid. Fourthly, he prescribed, that for all wood combustible he used to pay a penny, called a *hearth-penny*, in satisfaction for all tithes thereof: and it was thereupon demurred. And it was adjudged to

(a) *Green v. Balser*, 2 Co. Rep. 42. ante. 189. *Lord v. Turk*, post. Bun. 122. post. 1312. *Lam- Hankey v. Gay*, Bun. 37. post. 619. *Dobioft v. bert v. Cummins*, post. 1016. *Curtisne*, post. 287. *Dickinson v. Reade*, post. 358.

be a good prescription. For other kind of tithes he alleged also other such payments of the like sums, &c. *Et quod omnes, et singulæ personæ, rectores de, &c.* have used to accept thereof, &c.; and the defendant traverseth: *quod omnes, et singulæ, &c.* had not accepted. And it was thereupon demurred; for he ought to have traversed the custom alleged, and not, *quod omnes, et singulæ, &c.* did not accept. For then, if any of them did not accept, he overthrows the prescription, which is not reasonable. And so was the opinion of the court. Wherefore it was adjudged, *quod prohibitio stet.*

1598.

Green
v.
Hun.

all combustible wood,
good.

H. 42 Eliz. A. D. 1599. B. R.

[217]

Austen v. Pigot. [Cro. Eliz. 736.]

PROHIBITION for suing for tithes, wherein it was suggested, that *P.* proprietor of the rectory of *B.* wherein those lands are, and all his predecessors have had twenty acres of pasture, and another close containing twenty acres of wood, in satisfaction of tithes. And his witnesses being examined, according to the statute of 2 *Ed.* 6. proved that he had the twenty acres of pasture, but not of wood. And thereupon *Coke*, attorney-general, prayed consultation: for the suggestion is not sufficient, that he had the close, &c. without shewing of what estate, or how. The suggestion also is not proved as it is alleged. But all the court held it to be well enough: for it is sufficient that he had it, and the other cannot shew how. And so doctor *Cotton's* case was ruled accordingly. The proof also in a prohibition need not to be so precise: but, if it appear that the court-christian ought not to hold plea thereof, it sufficeth. And therefore, if there be a prescription, that the parson holds an hundred acres of land in satisfaction of tithes, and the proofs be, that he holdeth sixty acres only in satisfaction of them, it is well enough. So here the substance is proved, that he held land in satisfaction, &c. wherefore it was agreed, that the plaintiff should declare, and, that the defendant should plead to issue.

Proof in
case of a
prohibition
need not be
precise.

Supra 199.

H. 42 Eliz. A. D. 1599. B. R.

Sibley v. Crawley. [Cro. Eliz. 736.]

PROHIBITION for tithes: the defendant shewed, that, before that time, the plaintiff had sued in chancery, to stay it by *English* bill, and afterwards brought a prohibition there, and a consultation was there granted; and, that this prohibition is for the same cause, *viz.* for matter of discharge: wherefore he prayed a consultation upon the statute of 50 *Ed.* 3. c. 4. which is, that consultation being once duly granted, there shall not be another

Prohibition
after con-
sultation, if
it were not
granted
upon ex-
amination
of the mat-
ter.

1599. prohibition. But the court held, that this consultation was not duly granted according to the intent of the statute; because the prohibition was not duly grantable there, and so out of the statute: for it was not duly granted upon an *English* bill. And by *Popham*, the statute is to be intended where the consultation is granted upon examination of the matter, and not for the insufficiency of the proceedings. *Quod fuit concessum*. Whereupon it was awarded, that the prohibition should stand.

Sibley
v.
Cranley.

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T. 42 Eliz. A. D. 1599.

Wortley v. Herpingham. [Cro. Eliz. 766.]

Not guilty
is a good
plea to an
action of
debt on the
statute of
2 & 3 E. 6.

DEBT. The plaintiff, being farmer of the rectory of *Kirkburton in comitat. Ebor.* brought debt against the defendant upon the statute of 2 Ed. 6. for carrying away his corn, the tithes not being set out, and demanded the treble value. The defendant pleaded not guilty. *Coke*, attorney-general, moved, that it was not any issue in this action. But all the court resolved, that it was well enough; for it was not for a *non fessance*, but for a *mal-fessance*, wherein the tort is supposed. And in an action upon the statute, which prohibits a thing, upon which a penalty is demanded, the issue may be *non culp.* or *non debet*, and so it hath been oftentimes ruled in this court. Wherefore the issue was joined accordingly.

M. 42 Eliz. A. D. 1599.

Crouch v. Fryer. [Cro. Eliz. 784.]

Copyhold-
ers of inhe-
ritance of a
bishop may
prescribe
under him
in a *non de-
cimando*.
Moore 618.
Yelv. 2.
S. C.

PROHIBITION for suing for tithes, &c. wherein is surmised, that the bishop of *Winton* was seised in fee of the manor of *Bishops-Walton*, whereof the plaintiff is a copyholder in fee: and that he, and his predecessors, from time whereof, &c. had been patrons of the church of *E.* whereof the defendant is parson; and that he, and his predecessors, from time whereof, &c. and all his farmers and copyholders of the said manor, had been discharged of tithes, &c. and shews, that this land is ancient copyhold of the manor demisable, from time whereof, &c. And because the parson sued for tithes, and the court christian would not allow of that plea in discharge, he brought the prohibition. And upon this surmise the defendant demurred. *Tanfield* for the defendant moved, that this surmise is not sufficient to ground this prohibition. For, although the bishop himself, being a spiritual person, may prescribe to be discharged, &c. because, by intendment, such persons might be so before the council of *Lateran*, by reason whereof their farmers for years, or tenants at will, might be so discharged, because their's is the possession of the bishop himself, as it hath been adjudged in

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Supra 167.

Wright's case; yet it is not so for copyholds, which are also

grounded by custom, before time of memory; so it cannot by indentment be the possession of the bishop at the time of the said council; but it must have continued in the hands of the copyholders a long time before; for otherwise it could not be copyhold. And in 29 *Eliz.* it was ruled, by advice of all the justices, upon a case depending in the exchequer, that, although the queen shall not pay tithes for her own possessions, because she is *persona mixta*, and so might well retain them, yet, if she grants them by patent in fee, her grantees, or her copyholder of inheritance, shall pay tithes; for they do not participate of the queen's prerogative therein: and this copyholder, who was before time, &c. cannot prescribe; for then there would be two times of memory, which is repugnant in itself. Wherefore, &c. *Coke e contra*; for although a lay person, at the common law, could not prescribe to be discharged of tithes, because he is not capable of such spiritual things; yet, as being tenant to a spiritual corporation, he may prescribe in them, but not in himself: for all those copyholds are derived out of the manors which were the possessions of the bishop; and the freehold yet abides in the bishop. For this prescription is for the bishop's benefit: for thereby he shall have the greater fines from his copyholders; especially the lord of the manor, who hath the advowson, may so prescribe; because, it may be, it was so at the foundation, that he and his copyholders should be discharged. Which is the reason, in *Cotton's* case, that the lord of a manor, in respect of a recompence given to the parson, shall have the tithes of his tenants. And so *Pigot* and *Herns'* case was ruled. Wherefore, &c. But *Popham* and *Fenner* held, that this prescription is ill; because the copyholders are intended to be before the council of *Lateran*, at which time every one might give his tithes where he would; and spiritual persons might prescribe to retain them to themselves: but they ought to prescribe in themselves, and their predecessors, and not in a *que estate* of the manor. And then a copyholder cannot prescribe to retain them himself; and so, by consequence, he cannot prescribe to be discharged: but a bishop may prescribe to have the tithes of his copyholders, which shall be good against the parson: and upon the erection of the patronage it could not be allowed, that copyholders should retain their lands discharged, which always should be out of the lords possession; and they ought to be appointed how they shall go by him, who had then the possession before the council, and that was intended to be the copyholder himself. But of lessees for years it is otherwise; for they shall be intended to be the possessions of the bishop himself, at the time of the council. Wherefore, &c. *Gawdy* and *Clench* doubted thereof: Wherefore, *adjournatur*, 8 *Ed.* 4. 13. Note, that *Pasch.* 44 *Eliz.* this case was argued again; and then

1599.

Crouch
v.
Fryer.

Supra 199.

Supra 200.

[220]

1599.

Crouch
v.
Fryer.

Gawdy, Penner, and Yelverton resolved, that this prescription was good; for all copyholds are derived out of the manor: and it shall be intended, that this prescription had its commencement at such time, when all was in the lord's hand; and the one prescription is not contrariant to the other, although both were from time whereof, &c. for the one shall give place to the other: and this objection may be, where a copyholder prescribes for common, or the like, which is usual. But *Popham* held his former opinion: yet, notwithstanding, it was adjudged for the plaintiff.

P. 43 Eliz. A. D. 1601. B. R.

Beal v. Web, [Cro. Eliz. 819.]

No consultation where a modus appears, though not precisely the same, yet was suggested. Vide supra 217. *Austen v. Pigot*, 8. P.

PROHIBITION for tithes against the defendant, farmer of the rectory of *Frittender*, in the county of *Essex*, it was surmised, that, from time whereof, &c. the plaintiff had used to pay 4s. *per annum*, in discharge of all tithes. And his proofs were, that he used to pay 4s. 6d. *per annum*. And upon this variance, a consultation was prayed. And because it appeared, that there were not any tithes due in kind to the parson, as he had sued; but it was a *modus decimandi*, although not in such manner as the plaintiff surmised, the court held, that the defendant should not have a consultation. For he had not any cause to sue for tithes of the land, and it was ruled accordingly. Vide 2 Eliz. Dy. 171.

T. 43 Eliz. A. D. 1601. C. B.

Blackwel's Case. [Cro. Eliz. 843.]

Tithes severed may be sued for in the court christian.

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PROHIBITION. The case was, that a parishioner severed the tithes from the nine parts; but being in a close, the gate was locked so that the parson could not come at them, and he sued in the spiritual court: and there the question was, whether the gate were locked, or open. And thereupon a prohibition was brought, supposing this to have been a temporal matter; for the tithes being severed are lay chattels. But the court said, that although the tithes be severed, yet by the statute they remain suable in the spiritual court. And then the other is but a consequent thereof, and therefore is there triable. And if they refuse to allow his proofs, as it was surmised, (but not within the prohibition,) it was said, that he ought to appeal.

H. 44 Eliz. A. D. 1602. C. B.

Robinson, Vicar of the Church of Kimbolton, v. Bedel,
[Cro. Eliz. 873.]

1602.

Robinson
v.
Bedel.

TRESPASS, for taking certain loads of wood, set out for tithes: the defendant pleaded not guilty. The plaintiff shewed in evidence, that in the time of king *Ed. 3.* the rectory was appropriated, and the vicarage then endowed, and (*inter alia*) the tithes of wood were allotted to the vicar. The defendant shewed, that, for 160 years last past, there had not been any vicar presented there, until the plaintiff obtained a presentation from the queen by colour of lapse; and so pretended, that in regard it had continued so long in this manner, it became reunited to the rectory. But the court informed the jury, that although a vicarage is always taken out of the parsonage, and for the necessity thereof may be reunited to supply the parsonage, yet, by continuance of time in not presenting a vicar, which is the default of the parson himself, it ought not to be adjudged to be a discontinuance of the vicarage. But somewhat ought to be shewn of the reuniting thereof. Wherefore, by the court's direction, the jury found for the plaintiff.

Vicarage
not re-
united to
the rectory
by non-pre-
sentment of
a vicar in
160 years.

T. 44 Eliz. A. D. 1602. B. R.

Day v. Peckvell. [Moore 915.]

IN debt for tithes, *non debet* was pleaded, and it was found that *debet* 78*l.*, and as to the residue *non debet*; and damages were assessed at 1*d.* and 40*s.* costs. The plaintiff released the damages and costs, and had judgment for the debt. Note, 1. The statute which gives treble damages does not allow the jury to give other damages. 2. No costs being given by the statute; the jury cannot assess costs. 3. Two farmers may join in an action upon the statute. 4. A farmer of tithes shall have an action by the equity of the statute, because he has the right to the tithes though the statute does not give the action to the farmer. 5. An agreement with the one farmer shall bind his companion.

Cro. Ja. 70.
S. C. af-
firmed in
error.

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H. 45 Eliz. A. D. 1603. B. R.

Gibson v. Holcraft. [Yelv. 31.]

THE suggestion in a prohibition to stay a suit in the spiritual court for tithes was, that the abbot of *Vale Royal* in *Cheshire* was seised of the parsonage of *W.* and of the grange of *Darnal*, whereof tithes were demanded by the present parson of *W.* and that the said abbot and his predecessors from time whereof, &c. were seised of the said parsonage of *W.* and of the said grange of *D.* in their demesne as, &c. in right of their abbey, and *ratione inde* showed

Pleading in
prohibition.

1603.

Gibson
v.
Holcraft.

the unity of possession in discharge of the tithes upon the statute of 31 H. 8. To which the defendant pleaded, that the abbey was founded 5 E. 1. (which is within time of memory), and shewed and confessed the unity of the parsonage and grange after the time of the foundation. And upon the motion of Coke, the attorney general (*per totam curiam*), the plea in bar is good; and it is not necessary to traverse the prescription, for the shewing of the foundation of the abbey to be after the time of memory is a sufficient confessing and avoiding. But, if the defendant against the suggestion of the perpetual unity would shew, that the demesnes before the statute, and in the time of the abbot, were in the hands of the farmers, &c. there, he ought to traverse the prescription; for although the possession was chargeable in other hands, yet as to the fee-simple which remained in the abbot, it is a discharge in right.

M. 2 Ja. A.D. 1604. B. R.

*Hall v. Fettyplace.** [Cro. Ja. 42.]

What custom for non-payment of tithes of later mowth is good.
† [223]

PROHIBITION for tithes; whereas he was seised in fee of three acres of meadow *infra parochiam de Sunning*; and that within the said parish there is such a custom, that every one seised of any † meadow within the same parish have used time whereof, &c. to cut down the grass upon such meadow growing at their proper costs, and the said grass to ted and shake abroad, and the said grass, so dispersed and cast abroad, to gather into weeks and windrows, and to put into small cocks; *et post primam circumlationem inde* the tenth cock *inde* to set forth for the parson, or his farmer, in satisfaction of all tithes, as well of the first mowth as of the latter mowth of that meadow for the same year, which the parson, &c. had used to accept, &c.; and allegeth, *in facto*, that he did so in such a year; and that the defendant sued him for tithes of the latter mowth, &c. And hereupon the defendant demurred: and it was moved for the defendant, that this prescription was not good; because there is no more given to the parson than he ought to have; for, by giving unto him the tenth cock, it is that which the law appoints, and therefore cannot be a recompence for another thing; for the tenth of the hay of the first mowth cannot be satisfaction for the tenth of the after mowth. But because it was alleged, that he at his own costs had tedded and shaken it abroad, and gathered it into weeks and windrows, and made it into little

* This case is differently reported by Moore, 758; for he says, that this prescription to make the first crop into small cocks in lieu of all the tithes of the first and second crop was not allowed: but, if he had prescribed to make it into great

cocks, or to carry it to the parson's barn, that would have been a good prescription. But *Qu.* whether this statement be not correct, and whether any tithes be due of the after mowth. *Vide infra*. Cro. Eliz. 660.

cocks, and so was at a greater labour and charge than the law appoints, and the parson hath benefit by the said labour, it is a good cause of discharge; and a precedent was shown, *Pasch. 37. Eliz. Rot. 284.* in this court, betwixt *Awbrey* and *Johnson*, parson of *Burghfield* in comit. *Berkshire*, where it was surmised, that every inhabitant there had used to cut down the grass in the meadows at the first mowth, and at his costs to make it into hay, and to set forth the tenth cock of hay in satisfaction of the hay coming as well as of the first mowth as of the latter. And it was adjudged to be a good bar for the tithes of the latter mowth: which was held to be all one with this case in question. And *Popham* said, he had known it to be resolved, that of right, without any special custom alleged, no tithes shall be paid for hay of the latter mowth; for the rule in our law is, that tithes shall be payed *ex annuatis renovantibus simul et semel.* (a) Wherefore, without view of any precedents, or hearing argument therein, they agreed, that the prohibition should stand.

1604.
Hall
v.
Fettyplace.
Infra 473.

H. 2 Ja. A.D. 1605. B. R.

[224]

Cornwallis v. Spurling. [Cro. Ja. 57.]

In debt by the parson of *Grovel* upon the statute of 2 *Ed. 6.* for not setting out tithes, a special verdict was found, that the lands whereof the tithes are demanded were parcel of the possession of the Templars, who were dissolved in the time of *Ed. 2.* and those possessions by act of parliament 17 *Ed. 2.* were given and annexed to the priory of *St. John of Jerusalem*, with all privileges, &c. And it was found that the Templars had a special privilege time whereof, &c. to be discharged of tithes of those lands which *proprieis manibus excolunt*: and it was found that, by special act of parliament anno 32 *H. 8.* the possessions of the priory of *Saint John* were given to the king by general words, *of all lands, tenements, &c. in tam amplis modo et forma*, as the abbot had them; and from the king those lands came to the defendant: and whether he should hold them discharged from the payment of tithes as the abbot had them was the question. And it was argued by *Tanfield* and others for the defendant, and by *Paget* and others for the plaintiff: and after argument all the court resolved, that he should not have the privilege to be discharged; for, by the common law, a lay person was not capable of such a privilege: and if such lands had come to the king by the relinquishment or dissolution of any monastery, the king should not have had the benefit of that privilege until the statute of 31 *H. 8.* And by that statute it is appointed, that all monasteries, abbeys, &c. which before had come, or afterwards should come to the king, by suppression, surrender,

Land of the
Templars
given to the
order of *St.*
John of Je-
rusalem by
17 *E. 2.*
and to the
king by 32
H. 8. is not
tithes-free.
Moore 913.
S. C.
Vide Infra.

(a) See *Fox v. Ayde*, 2 P. Wms. 520. post. 697. *Andrews v. Lane*, post. 473.

1605. &c. the king should have in such manner and form, &c. and that he should have them discharged from the payment of tithes as the abbots, &c.; so as the makers of that law intended, that by the first clause, without the last, they should not hold them discharged, and therefore they added that clause. But this statute extends only to such possessions as came to the king by surrender, &c. and should be vested in him by force of the said act; and doth not extend to possessions which vested in him by another act of parliament, so not by the first; according to the rule which is taken in 2 Co. 46. in the archbishop of *Canterbury's* case. And these lands were here given to the king by a special act of parliament, 32 H. 8. which hath the same words in the first clause as the act of 31 H. 8. hath, but hath not the second; and therefore there is no cause of holding them discharged from tithes. And so it was adjudged accordingly for the plaintiff. And in this same term a like judgement was between the same parties in a prohibition upon a demurrer. (a)

P. 3 Ja. A. D. 1605. B. R.

Champernon v. Hill. [Cro. Ja. 68.]

One action may be brought upon the statute of 2 & 3 E. 6. upon several titles, if those titles be conjoined in the plaintiff. Yelv. 68. Moore 914. 1 Brownl. 86. Noy 3. S. C.

IN debt upon the statute of 2 Ed. 6. for not setting forth tithes, the plaintiff shewed that two parts of the tithes of the place, &c. appertained to the rectory, and the third part to the vicarage; and that he had a lease for years of the rectory, and another lease of the vicarage; and for not setting forth the tithes he demanded according to the statute the treble value. The defendant pleaded *non debet*, and found against him: and it was now alleged in arrest of judgement, that inasmuch as the plaintiff's cause of action is grounded upon several leases, he ought to have brought several actions, his title being several: but the court held that the action was well brought, in regard he had both titles in him, and he is to have the entire tithes; and this action is brought upon the tort, because he did not set out the tithes: wherefore it was adjudged for the plaintiff.

M. 2 Jac. A. D. 1605.

Brook v. Rogers. [Cro. Jac. 100.]

Boughs and decayed trees above the age of 20 years are not titheable.

PROHIBITION. For that a person sued in the spiritual court for tithes of boughs of trees above the age of 20 years; surmising in his plea, that the trees were *aride, cavæ, et in culminibus putridæ*, and, therefore, prayed consultation; and, upon this plea, it was demurred.

(a) In *Urrey v. Bowyer*, post. 250. In *Hanson Whitton v. Weston*, post. 410. and *Fosset v. Fielding*, post. 663.; and in the *Serjeant's Case*, *Franklin*, post. 1579. such lands are held to be post. 281. the point is left undecided; but in discharged.

It was alleged for the plaintiff, that, in regard the trees were once discharged from the payment of tithes, the boughs nor the bodies of such trees shall never after be charged with the payment of tithes coming of them; and the statute 50. Edw. 3. c. 4. is but an affirmance of the common law.

This was agreed to by the court. But they doubted of the principal case; for *Gawdy* and *Daniel* conceived they were not now titheable, because once they were not; and the body being privileged, so shall the boughs.

But *Warburton* and *Walmsley* doubted thereof, because the trees were not for other uses than for firing, and bare not any fruit: and it was not waste to cut them down; therefore they were titheable.

They all held that trees above twenty years' growth, which are timber, although the loppings are cut every ten or twelve years, yet they are not titheable; *et adjournatur. (a)*

1605:

Brook
v.
Rogers.

M. 3 Ja. A. D. 1605. B. R.

Hutton v. Barnes. [Yelv. 79.]

HUTTON being sued in the spiritual court at *Durham* for tithes, brought a prohibition there, and suggested that the prior of *Durham* was seized of the grange of *Sesgersonwick* in right of the church, viz. the priory; and prescribed in the prior and his predecessors to hold that grange without payment of any tithes; and shewed the dissolution of it, and how it came to *H. 8.* and the statute of 31 *H. 8.* to hold it as the house of religion held it before; and derived to himself a lease of 50 years from queen *Elizabeth*; and after his prescription in *non decimando*, shewed how the defendant sued him in the spiritual court for the tithes of forty fleeces of wool. To this the defendant pleaded, that he sued the plaintiff for the tithes of 400 fleeces of wool, and prayed a consultation; and for the variance between the libel and suggestion the justices of assize awarded a consultation, and adjudged double costs to the defendant. And *Yelverton* assigned both these matters for error. And *per curiam*, they are error; for the variance is not material here, because the plaintiff prescribes in *non decimando*, and thereby ousts the spiritual court of all manner and power of jurisdiction for any tithes arising from this grange, because it is discharged *in se*; but if the suggestion had been on a *modus decimandi*, then it would be otherwise; for there the suit for tithes belongs originally to the spiritual court, and therefore there the suggestion ought to agree with the libel; for if the parson libels for tithe of hay, and the other will suggest a custom for tithe of corn, that is not to the purpose; for it is not for the same thing. The same law where they vary

A variance between the suggestion and the libel, where the plaintiff in prohibition prescribes in *non decimando*, is not material: *accide*, where in *modo decimandi*.

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(a) The consultation was refused, see S. C. Moore 908.

1605.

Hutton
v.
Barnes.

The defendant in prohibition entitled to double costs only for want of proof of the suggestion.

in the quantities of the thing demanded, because the suggestion is founded upon the libel, and the plaintiff is to stay the proceedings there but for one cause certain. But in the case *supra*, the suggestion discharges the spiritual court from all manner of power for any tithes at all; and therefore the variance is not material. 2. The judgement for double costs was error on the express letter of the statute of 2 & 3 E. 6. which gives double costs only for want of proof of the suggestion, and for no other cause. *Quod nota.*

M. 2 Jac. A.D. 1605. B. R.

Webb v. Warner. [Cro. Jac. 47.]

PROHIBITION. The case was, that Sir *Henry Warner*, libelled in the spiritual court for tithes of rough hay growing in the marshes and fenny lands of *Milden-hall*.

A lay person cannot prescribe in *non decimando*, and tithes shall be paid for fenny fodder gathered in the marshes to feed cattle with.

The Plaintiff brought a prohibition, surmising that there were two thousand two hundred acres of fenny land within the parish, and six hundred acres of meadow; and that the parishioners paid tithe of hay and grain growing upon the meadow and arable land, and had paid two-pence halfpenny for every cow and one penny for every calf. And, because they had not sufficient grass within the parish to sustain their beasts in winter, they used to gather this hay, called *fenny fodder*, for the sustenance of their beasts, for the better increase of their husbandry, and for this cause had been always freed from the payment of tithes, &c. (a)

It was hereupon demurred in law, and, after argument at the bar, adjudged for the defendant that the surmise was not sufficient; for one may not prescribe in *non decimando*; and in that it is alleged they bestowed on their cattle there, &c. and for this cause did not pay tithes, that is not any cause of discharge, for so they may prescribe for corn spent in their family, or for corn given for provender to their cattle, whereby no tithes should be paid. (b) Wherefore it was adjudged an ill surmise, and consultation was awarded.

M. 2 Jac. A.D. 1605. B. R.

Barker v. Sir Nicholas Bacon. [Cro. Jac. 48.]

By a grant of tithes *infra dominicum de B. ac aliam omnes alias decimas monasterio de B. spectant*

PROHIBITION to stay a suit for tithes. The case was upon demurrer, that queen *Elizabeth*, in the 37th year of her reign, granted, &c. by her letters patent to Sir *Nicholas Bacon*, *omnes et omnimodas decimas granorum, herbagii, lactis, agnorum, vitulorum, &c. infra dominicum de Bury Sancti Edmundi, quandam spectant, et quæ collectæ fuerunt per eleemosynarium* of the said abbey.

(a) *Hayes v. Dowse*, Bun. 279. post. 679. *Mantell v. Paine*, post. 1504. *Stevens v. Aldridge*, 5 Pri. 334. post. vol. 2. Degge. P. C. p. 2. c. 3.

(b) See Roll's Abridgement, 647. pl. 10. *Underwood v. Gibbon*, Bun. 3. post. 1582. *Hale v. Bragg*, post. 861. *Robinson v. Tunstall*, n. ibi. *Williamson v. Lord Lonsdale*, 5 Pri. 25.

By reason of this patent, Sir Nicholas Bacon claimed the petty tithes of lands, &c. in *Bury*.

The plaintiff claiming them by a second patent from the queen, averred that no tithes were collected by the almoner except tithes of corn.

The question was, whether the small tithes should pass by the first words, or be restrained by the last words, "et quæ collectæ fuerunt per eleemosynarium," it being averred and confessed by the demurrer, that no tithes were collected by the almoner except tithes of corn.

After argument at the bar, it was resolved by the whole court, that all tithes *infra dominicum de Bury* passed by the first words, and they are not restrained by the second; for they are granted particularly and indefinitely, and without restraint, and therefore the restraint comes only to the last clause, which is general, "ac omnes alias decimas dicto monasterio nuper spectant," and do not extend to the first clause, which comprehends in itself convenient certainty. And it is not like to the cases of *Hall v. Pert* (a) and *Bozoim's case* (b), reported by Mr. Attorney, for there the sentence being *omnia illa messuagia in tenurâ B. situat. in W. &c.* every part thereof ought to be true, otherwise nothing passes, for *illa* is not served until the end of the sentence, and it is all but one entire sentence, and no part thereof is vain; but here the sentences are distinct, and the restraint refers only to the last sentence; and this case is the stronger, for the second sentence is, "ac omnes alias decimas," which refers that it is other tithes than what was intended to pass by the first sentence. Also it is more general than the first, for the first extend only to tithes in *Bury*; but the second is of all tithes *nuper pertinentia monasterio de Bury*, which is *ubicunque*; and therefore hath that restraint, *et quæ collectæ fuerunt per eleemosynarium*. Wherefore, for these reasons, it was adjudged for the defendant.

1605.

Barker v. Sir Nicholas Bacon.

quæ collectæ fuerunt per Eleemosynarium ejusdem monasterii the tithes infra dominicum de B. pass, though not collected by the almoner of the abbey, for they are distinct clauses.

P. 4 Jac. A.D. 1606. B. R.

Grene v. Austen. [Yelv. 86.]

AUSTEN, vicar of *Aveley* in *Essex*, libelled in the spiritual court, for the tithes of herbage and agistment of cattle on the grounds there after harvest. This was against *Grene*, who brought a prohibition, and laid a custom within the parish, *quod quælibet persona habens et possidens aliquod pratum sive fundum in aliquo itno anno infra parochiam prædictâ unde fœnum eodem anno nactum fuit sive proventus a tempore cujus, &c. usa fuit et consuevit aptis temporibus anni illius gramen super hujusmodi pratis sive fundis crescens ad ex-*

The rector *primâ facie* entitled to all the tithes of the parish, nor can the court presume any thing in favour of the vicar without en-

(a) 2 Co. 32. a.

(b) 4 Co. 35. a.

1606.

Greene
v.
Austen.dowment or
prescrip-
tion. 8. C.
Cro. Jac.
116.

[227]

Land which
has paid
tithe hay,
not charge-
able with an
agistment
tithe the
same year.

*pensas suas proprias metere et defalcare, et gramen sic messum postea ad similia custagia, &c. in cumulos, vocat' cocks, congerere, et quemlibet decimum cumulum sic inde congest' a cæteris novem cumulis, &c. ad usum rectoris ecclesiæ parochial' præd' sive ejus firmarii, &c. dividere et exponere, in plenam et integram contentionem, solutionem, satisfactionem, et exonerationem, ac nomine et loco omnium et singular' decimarum quarumcunque de in vel super aliquibus hujusmodi pratis sive fundis unde fœnum in hujusmodi anno nactum fuit, eodem anno surgen', renovan', &c. quem quidem decimum cumulum, &c. in forma, &c. congest', &c. omnes et singuli rectores, &c. in plenam et integram contentionem, &c. ac nomine et loco, &c. acceptaverunt, &c. and alleged in factum a performance of the custom the same year the vicar libelled. And thereupon the defendant, being vicar, demurred; and it was adjudged for the plaintiff. And two points were resolved. 1. That payment of the tithes to the parson is a sufficient discharge against the vicar, because all tithes of common right belong to the parson, and the vicarage is derived out of the parsonage; so that no tithes *de jure* belong to the vicar, but only on an endowment or prescription, which ought to be shewn *ex parte* of the vicar, and the court cannot intend it, for the vicarage is a diminution or impairing of the parsonage, of which the court will not take notice unless the parties shew it. 2. That the custom *supra* is good; for in regard the owner of the ground pays tithe of hay, he is thereby discharged of common right from tithe of agistment of the same land in the same year, because one land shall answer but one tithe for one year, and the agistment is but the profit by the mouths of the beasts of the same land of which before the parson had tithe of hay. (a) And *Tanfield* justice said, it was adjudged in one *Edolphe's* case *de com. Oxon*, that once paying tithe of rye or wheat by the sheaf, cannot afterwards pay tithe of halm of the same land; for the halm is but part of the stalk on which the tithe sheaf grew; according to *F. N. B.* 53 b. *Yelverton pro querente*.*

M. 4 Ja. A. D. 1606. B. R.

Lady Waterhouse v. Bawde. [Cro. Ja. 133.]

An action
on the case
does not lie
for being
sued for
tithes of
silva cædua.

ACTION upon the case; the plaintiff declares, whereas by the statute 45 *Ed.* 3. *cap.* 3. tithes ought not to be paid for gross trees; and by the statute 32 *Hi.* 8. *cap.* 7. none ought to be sued for tithes of gross trees; that she had cut down such timber trees being above the growth of 20 years, and that the defendant as parson sued her for tithes of them against the said statute. Upon this declaration, it was demurred; for it was moved, when a statute prohibits suing,

(a) *Ayd v. Flower*, Bun. 7. post. 613. *Frank-* 332. post. 1335. *Tennant v. Stubbing*, 3 Anstr. lin v. *Master*, &c. of *St. Cross*, Bun. 78. post. 629. 640. post. 1438. *Batchellor v. Smallcombe*, 3 Mad. *Chapman v. Keop*, post. 779. *Ellis v. Saul*, 1 Anstr. 12. post. vol. 2.

and gives no special penalty, there action upon the case lies not for doing a thing against the prohibition of the statute; as, where a man distrains *extra feodum*, or in the highway, &c. And all the court held, that the action lies not; for no one shall be punished for suing in the spiritual court for any matter which is properly demandable there, although peradventure he hath not any cause of action; but, if he sues in the spiritual court for matter which it appears by his libel is not suable there, and of which the said court hath not any jurisdiction, but the common law hath jurisdiction, there, action upon the case lieth; for it is a suit for vexation, and seeks to take away the jurisdiction of the courts of the common law; but, if the suit be there for a thing demandable and recoverable there, by any thing which appears by the libel; and by the defendant's plea, or by any collateral matter he is barrable there; no action upon the case lieth: and here although the statute be, that none shall be compellable to pay tithes of gross trees, yet it is lawful for the parson to draw it in question in the spiritual court, whether they were gross trees or not. And they held, that where a statute prohibits a thing, and adds no penalty, true it is, that an action lies for doing against the prohibition of that statute; but that ought to be an action brought *tam pro rege quam pro seipso*; because in such case the king is to have a fine: and for that this action is brought only by the party, and not *tam pro rege quam pro seipso*, therefore they all held, although otherwise an action might lie, yet for this cause it was not well brought: wherefore it was adjudged for the defendant.

1606.

*Lady
Waterhouse
v.
Bawde.*

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Where a thing is forbidden by a statute, and no penalty specified, the action must be *tam pro rege quam, &c.*

M. 5 Ja. A. D. 1607. B. R.

Anonymous. [Cro. Ja. 199.]

PROHIBITION; it was held *per curiam*, that tithes of birch shall be paid, although it be of 20 years growth, and more; so of holly, alders, and maple; and (the principal question being concerning birch) a consultation after some advisement was awarded; and Coke cited one *Leonard's case*, 34 *Eliz.* to be so adjudged. (a)

Birch tithable though above 20 years growth.

M. 5 Ja. A. D. 1607. C. B.

Skidmore and Eire v. Bell. [2 Inst. 659.]

JOHN Skidmore and *Robert Eire* were plaintiffs in a prohibition against *John Bell*, parson of *St. Michael, Queenhithe*, in *London*. The case upon the said statute of 37 *Hen. 8.*, and the decree thereupon, was this: The said parson, libelled before the Chancellor of *London*, for the tithes of a house called the *Bore's-head*, in *Breadstreet*, in the said parish, by force of the said act and decree, the

(a) *Forster v. Peacock*, Mo. 907. pl. 1270.

1607.

*Skidmore
and Eire
v.
Bell.*

Prohibition
to a suit in
the ecclesi-
astical court
for tithes in
London
upon the
statute
37 H. 8.
and decree.

ancient farm rent whereof was five pounds at the time of the said decree and after; and that, of late, a new lease was made of the said house, rendering the rent of five pounds *per annum*, and over that, a great income or fine, which was covenanted or agreed to be paid yearly at the same day; that the rent was paid as a sum in gross, and that so much rent might have been reserved for the said house, as the rent reserved, and the sum in gross amounted to; which reservation, and covenant, &c. were made to defraud the said parson of the tithes of the true rent of the said house, which to him did appertain by the pure, just, and true intention of the said decree; and in this case four points were resolved by the whole court:

First, if so much rent be reserved as was accustomed to be paid at the making of the said decree in 37 H. 8. (whatsoever fine or income be paid) that the parson can aver no covin; for the words of the decree be, "where any lease is or shall be made of any dwelling-house, &c. by fraud or covin, in reserving less rent than hath been accustomed, or is paid, &c.;" so as if the accustomed rent be reserved, no fraud can be alleged, for the fraud by the decree is, when lesser rent than was accustomed to be paid is reserved, or if no rent at all be reserved, &c. for then tithe shall be paid according to the rent, that then was last before reserved to be paid. The words of the decree are, "or that any lease shall be made without any rent reserved upon the same by reason of any fine or income, then the farmer shall pay for his tithes after the rate aforesaid, according to the quantity of such rent as the house was lastly letten for, without fraud or covin, before the making of such lease." So as the decree consisteth upon four points, viz. first, where the accustomed rent, &c. was reserved. Secondly, where the rent was increased, there the tithes should be paid according to the whole rent. Thirdly, where lesser rent was reserved. Fourthly, where no rent was reserved, but had been formerly reserved. And this act and decree were very beneficial to the clergy of *London* in respect of that which they had before, and the defendant in his libel confesseth that the accustomed rent was reserved, and therefore, no cause of suit. (a)

Secondly, it was resolved, that such houses as were never letten to farm, but inhabited by the owner, this is *casus omissus*, and shall pay no tithe by force of the decree. (b) Thirdly, it was resolved, that where the decree saith, "where no rent is reserved by reason of any fine or income paid before hand," albeit no fine or income be

(a) *Meadhouse v. Taylor*, Noy. 130. post. 329.
• n. *Dunn v. Burrell*, post. 299. *Sheffield v. Pierce*,
post. 503. *Ivatt v. Warren*, post. 1054. *Sayer v.*
Mumford, post. 546. *Kynaston v. Willoughby*,
post. 891. n. *Warden and Minor Canons of St.*
the Dean, 4 Pri. 63. post. vol. 2. *Minor*

Canons of St. Paul v. Crickett, 5 Pri. 14. post.
vol. 2.

(b) This proposition is denied by Sir *W. Grant*,
M. R. in *Antrobus v. E. I. Co.* 13 Ves. 9. post.
vol. 2. and see *Kynaston v. E. I. Co.* *ibid.*

paid in that case, yet, if no rent be reserved, the parson shall have his tithes according to the decree, for that is put out for example or cause why no rent is reserved, and whether any fine or income were paid or no is not material as to the parson. Fourthly, it was resolved, that the parson should not sue for those tithes in the ecclesiastical court, for that the act and decree that raised and gave these kind of tithes, did limit and appoint how and before whom the same should be shewed for, viz. that if a controversie were moved in the city for not payment of those tithes, or concerning the true rent or tithes, that then, upon complaint made by the party grieved to the lord mayor of *London*, he, by advice of his assistants, should make a final case with costs, to be awarded by his discretion. And if the mayor doth not make an end of it within two months, or if any of the parties find themselves grieved, that then the lord chancellor, within three months, shall make an end thereof with costs, according to the true intention of the said decree; therefore, as the decree gave a new and special kind of tithings, so it did appoint new and special judges to hear and determine the same.(a) And in the end it was awarded, that the prohibition should stand.

1607.

*Skidmore
and Eire
v.
Bell.*

T. 6 Ja. A. D. 1608. B. R.

Edmonds v. Booth. [Yelv. 131.]

BOOTH, parson of *B.* in *Suffolk*, leased all his tithes of 200 acres of land, whereof *Rabbit* was then seised, to him and his wife, and the heirs of *Rabbit*, to the said *Rabbit* by indenture, *habend'* from *Mich'* next to him and his heirs during the life of *Booth*. *Rabbit* died, and *E.* his wife had these 200 acres for her jointure; she married *Fowler*, who demised the 200 acres to *Edmonds* the plaintiff, and the heir of *Rabbit* granted also to the plaintiff the tithes of these acres at will, and being sued by *Booth* for tithes in the spiritual court against his own lease, he brought a prohibition on the matter aforesaid; and upon demurrer it was adjudged for the defendant, and that he should have a consultation. Wherein the point was, whether the lease was void, because it was to commence at a day to come, and was for life. And *Fleming* chief justice, *Fenner* and *Williams* conceived that it was void; for although tithes are spiritual, and are not extinct in the land; yet in the conveyance of them they ought to follow the nature of the land, rent, or other hereditaments, which being *in esse*, as 8 *H.* 7. 3. is, cannot be granted to commence at a day to come, if an estate for life be limited; and as 21 *H.* 6. 46. tithes are always *in esse*. But by

A freehold
lease of
tithes can-
not com-
mence in
futuro.

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(a) *The Warden and Minor Canons of St. Paul* Lit. Rep. 102. post. 433. *Langham v. Baker*,
v. *Crickett*, 2 Ves. 563. post. 1425. and see the Hard 116. post. 511. *Unfreville v. Batchelor*, post.
authorities collected there. *Burgess v. Symons*, 548. *Ex parte Croxall*, 3 Atk. 639. post. 812.

1608.

Edmonds
v.
Booth.

Yelverton and *Croke* contrary; for here the lease is made but of those tithes, which should be due for the land of which *Rabbit* was then owner, so that it does not enure by way of interest, but by way of discharge and retainer, for *Rabbit* cannot have tithes of his own land, and then a discharge may well commence at a day to come, as to be discharged from suit to a mill, or such like. But by the chief justice and *Williams*, as the lease is pleaded, it cannot be taken to enure by way of discharge; for the plaintiff pleads, by force whereof *Rabbit* was seised of the tithes to him and his heirs for the life of *Booth*; so that the plaintiff having pleaded it by way of interest, they as judges cannot intend or construe it otherwise. And, by *Fleming* chief justice, this lease cannot enure by way of discharge, for there are no such words in the lease; which proves it was not intended by the parties to operate but by way of interest, and that was more beneficial for the lessee; for if it should enure by way of discharge only, it is such a privilege annexed to the land, as cannot be granted over; but, if by way of interest, it may well be granted over. And so much appears also in this case; for the wife of *Rabbit* is owner of the land, but the son takes upon him to be owner of the tithes, which cannot be, if the first lease had enured by way of discharge. And *Yelverton* inclined much thereto, that the pleading of the lease, and the seisin by force of the lease, was not good. *Quod nota.* (a)

M. 8 Ja. A. D. 1610. B. R.

[230]

Roberts's Case. [12 Co. 65.]

A suggestion that the plaintiff in prohibition had but one witness to prove a deed in the spiritual court is not a sufficient ground for a prohibition, unless such witness were offered and refused.
Cro. Ja. 269. S. C.

IN this term, in the case of one *Roberts*, a prohibition had been granted in a case of subtraction of tithes, upon surmise that the plaintiff, who was the defendant in the spiritual court, had but one witness in that court to prove his demise; to which that court said, that *singularis testis* is not allowable: and upon consideration and sight of a prohibition granted upon the same cause in Hil. 3 El. in *Banco Regis*, it was resolved by *Coke* chief justice & *totam curiam in Communi Banco*, that a consultation should be granted, and this for divers causes.

1. It appears by the Register, fol. 5. that it is put for a rule, *quod non est consonum rationi, quod cognitio accessorii in curia Christianitatis impediatur, ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere*: and with this agrees 1 R. 3. 4.

2. If such a surmise were allowed, then in every case for mere delay it might be made; for he who was plaintiff in the spiritual court cannot deny, that where it is surmised that he hath one witness, that he hath two or more, for then he affirms matter against himself: and when the spiritual court hath jurisdiction of the prin-

(a) See *Hawkes v. Brayfield*, Cro. Jac. 137.

cipal cause, they determine the accessory. But it was objected, that if *A.* claiming a lease by *B.* of a rectory, libels for subtraction of tithes, and the defendant pleads a former lease made by *B.* and *C.* and the defendant hath but one witness in the case to prove the former lease, if no prohibition shall be granted, the defendant shall be charged: and if *C.* sue him upon the statute of 2 *Ed.* 6. at the common law, the testimony of that one only will there be sufficient, and so he shall be twice charged: to which it was answered, that first the fault was the defendant's, that he would not set forth his tithes, and then he shall be charged whosoever takes them: but in such a case, those of the ecclesiastical court will upon one good witness, and any concurrent vehement presumption, as possession, or the like, allow of such a proof: and the testimony of one witness in our law is no conclusive evidence, but ought to be left to the conscience of the jury, and so the validity or invalidity of proof of matters of *fact* shall be left to them; but if a question of the common law arise from the party upon the construction of a statute, or the like, and those of the ecclesiastical court will take upon them to judge of it against the rule of law, there, upon special surmise of it, and upon the shewing of the answer or other pleadings of the parties, by which it appears to the court, that such surmise is on a good ground, a prohibition lies; for matter in law, arising upon estates or interests (given) by the common law and construction of statutes, ought to be determined according to the rules of common law; *et non debet trahi ad aliud examen.*

1610.

Robert's
Case.

[231]

And *Coke* chief justice cited a notable judgment, *Pasch.* 35 *El.* in *Bank le Roy* (a) — *Fuller* brought a prohibition against *Clemens* and *Wiskard*; and *Fuller* counted that he himself was owner of the rectory of *Longham* in the county of *Norfolk*, and libelled against *Clemens* one of the defendants, before the official of the bishop of *Norwich*, for subtraction of tithes, *scil.* of wheat, &c. pendent which suit, the said *Wiskard*, intervening *pro interesse suo*, made these allegations against the said *Fuller*.

1. That the said rectory was impropriate to the monastery of *Wendling*, and by the dissolution of the said monastery, came to the hands of *H.* 8. and conveyed it by mesne descent to queen *Elizabeth*, who by her letters patent of concealment granted it to *Min* and *Hall*, who enfeofed *Bozome*, who let it to *Wiskard* for four years, and proved his allegations by witnesses, upon which in fine, sentence was given against *Fuller*, and 8*l.* 10*s.* given to *Clemens* for costs, and 13*l.* 6*s.* to *Wiskard*; and after *Fuller* appealed to the court of the arches, and there *Fuller* claimed the said rectory by reason that *Hall* was seised of it, and by his deed gave and granted the said rectory, and all lands and tithes to it appertaining, to sir

(a) Cro. Jac. 270. by the name of *Fuller* v. *Whiskin*.

1610.

Robert's
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Edward Clere, before the feoffment supposed to be made to *Bozome*, and that sir *Edward Clere* by his deed enfeoffed *Fuller*; and although that he offered to prove the delivery of the deed of the said feoffment made to sir *Edward Clere* by one sole witness, the ecclesiastical court would not allow it without producing another witness: and *Fuller* further said, that although he had further alleged there, that these were matters determinable at the common law, notwithstanding they gave sentence: the defendants to have a consultation pleaded, that *Fuller* in the said court of the arches proved the delivery of the deed aforesaid, by sir *Edward Clere* and *Mouse*, but could not prove livery and seisin according to the deed: and for this cause sentence was given, without (for) that the judges of the arches would not admit the said proof, unless he proved the deed by other witnesses; upon which *Fuller* demurred in law; and it was objected by the counsel for *Fuller*,

1. That *Wiskard*, who is a mere stranger to the suit, and who comes in *pro interesse suo* in the said rectory, pleads matter merely determinable at the common law, *scil.* letters patent, feoffment, and lease for years; and on the other part *Fuller* claims an estate in the said rectory, by conveyance at the common law. And now the question in the ecclesiastical court being only who hath the best estate in the said rectory by the common law, this ought to be tried by the common law, and not in the ecclesiastical court; for this is the birth-right of the subject to have his inheritance and freehold tried and determined by common law; for the civil law differs much in deciding of inheritances.

2. It was objected, that all matters in law ought to be determined by the judges of the law; and in this case, matters of law arising, *scil.* if a man hath a rectory impropriate, which consists in glebe and tithes, and by his deed gives and grants the said rectory, and all lands and tithes any way belonging or appertaining to it, to another and his heirs; and no livery is made in this case, if the tithes shall pass, or no, for that tithes may pass without any livery: this question is not fit to be determined by the ecclesiastical judges, but by the judges of the common law, *quod quisque novit, in hoc se exercent.*

3. It was objected, that *Wiskard* was a mere stranger to the suit, and all his allegation is temporal, and for that it is a stronger case to maintain a prohibition, forasmuch as betwixt him and *Fuller* nothing is in question, but to whom the inheritance of the rectory belongs; but *Clemens*, who is sued for subtraction of tithes, hath greater colour in his defence, being lawfully sued in the ecclesiastical court, than *Wiskard*, who is no party to the suit for any ecclesiastical cause, but all his allegation, as hath been said, is temporal.

4. It was objected, that *Fuller* had but one witness to prove the

delivery of the deed; and in the ecclesiastical law, *unus testis est nullus testis*; for all which causes it was prayed that the prohibition may stand, and that no consultation may be granted. 1610.

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To which it was answered and resolved by sir *Christopher Wray*, chief justice, and *per totam curiam*.

1. That to the first objection, for that the original belongs to the ecclesiastical court, the determination of all that which depends upon it belongs to the judges of the same court, although that the matter be triable by the common law; but where the original matter belongs to the common law, and is there commenced, and issue be taken upon matter triable by the ecclesiastical law, there the judges of our law shall write to the judges of the ecclesiastical court to try it, and to certify: and the reason of this diversity is, that our judges have authority to write and command them by the king's writ to certify to them; but they cannot write to the judges of our law to try any thing, and to certify them, for they have no such authority to command by writ, but they are to obey the writs of the king: as in any action ancestrel, if bastardy be pleaded in the demandant, and upon this issue be joined, this shall be tried by the bishop, and his certificate shall bind: so in a *quare impedit*, if issue be taken, whether a clerk, which was presented, was able, or not able, this shall be tried by examination of the clerk, and certified by the bishop: but, although that such issues are in their nature triable by the ecclesiastical law, yet, if the case was such, that the ecclesiastical court could not try it, then (to the end that justice should not be wanting) such ecclesiastical matter should be tried by the common law, as 4 *Ed. 3.* 26. if the presentee be dead, if he was able, or not able, shall be tried *per pais*; for the bishop cannot try it: but against this was objected the statute *de articulis cleri*, c. 13. by which it is provided, *quod de idoneitate personæ præsentatæ ad beneficium ecclesiasticum pertineat examinatio ad judicem ecclesiasticum*; upon which it was concluded that the trial *de idoneitate personæ* in all cases belongs to court-christian. To which it was answered and resolved, that true it is, that the trial of ability belongs to them; but the statute explains in what manner it shall be made, for the statute saith, *pertinet examinatio ad judicem ecclesiasticum*, so that this trial ought to be by examination of the party, and this cannot be when the presentee is dead: and although he be not party to the writ, yet he may be examined; and with this agrees 39 *Ed. 3.* 2. The earl of *Arundel's* case, and 4 *Ed. 3.* 25. 16 *El. Dyer* 327. (a) So, if bastardy be alleged in one who is not party to the writ, there, for this, that the certificate binds for ever, it should be against law and reason, that he should not be party to

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the certificate; for this cause in such case it shall be tried *per pais*, and if any difficulty ariseth upon it, the judges of our law use to consult with the judges ecclesiastical; and with this accords 4 *Ed.* 3. 37. The same law of profession, 42 *Ed.* 3. 8. So, if bastardy be alleged in one who is dead. *Vide* 17 *Ed.* 3. 5. where bastardy is alleged in the tenant, and one who is a stranger to the writ, who are sisters. *Vide* 32 *Ed.* 3. *Trial* 59. where the tenant alleged bastardy in himself, and the demandant averred him *mulier*. *Vide* 29 *Ass.* pl. 14. 6 *El.* *Dyer* 226, 228. If the issue be *quod vacavit per resignationem*, part of which is temporal, and part spiritual, this shall be tried *per pais*. *Vide* 9 *H.* 7. Profession and the time of it, &c. But admission and institution, although that it be alleged in a stranger to the writ, yet this shall be tried by the ordinary; as it appears 7 *Ed.* 6. 78. 6. in *Dyer*; for admission, institution, resignation, *et similia*, are judicial acts, and remain in their courts and register, upon which they ground their certificate; otherwise it is of bastardy, idoneity, &c. By which it appears; that in divers cases the judges of the common law write to the ecclesiastical judges commanding them to certify some thing put in issue; and the judges of our law prohibit the ecclesiastical judges to hold plea of some things which are determinable at common law; but the ecclesiastical court hath not power to write to our judges, or to command them, or to prohibit them when they hold plea of things determinable by the ecclesiastical judges; but this is erroneous, and shall be reversed by error. And on the other side, if in the ecclesiastical court the suit is for a legacy, and the defendant plead a release, if in the admitting or rejecting of proofs concerning this release, which is matter determinable at common law, they do wrong to the plaintiff or defendant, they have no remedy but by way of appeal.

2. To the second it was answered and resolved, that if upon consultation with men learned in the law, they give sentence according to law, this is well done; and no prohibition ought to be granted; but if they take upon them to draw the interest of any man *ad aliud examen*; and to judge against the rule of law, concerning the inheritance or interest of any, there prohibition lies: and in the case at the bar, they well resolved the law, for by the said livery of the charter the tithes do not pass as gross, for this, that the intention of the parties was to pass the entire rectory by feoffment, and not to pass the tithes by the same, and so to dismember the rectory by fractions, and that by construction of law, against the intention of the parties.

3. As to the third, it was answered and resolved, that by the ecclesiastical law, a stranger may come in *pro interesse suo*; and when they have jurisdiction of the original cause of the suit, we

ought not to draw in question their order and proceeding; but if they proceed *inverso ordine*, or not observing form, this ought to be redressed by appeal: and although that the matter depending upon the original cause be determinable by the common law, yet it shall be determined, as it hath been said, in the ecclesiastical court.

4. As to the fourth objection, it was answered and resolved, that such a surmise, that he hath but one witness, is not sufficient to have a prohibition, for this, that the ecclesiastical court hath jurisdiction of the principal, and if such a surmise shall be sufficient, all suits in the ecclesiastical court shall be either delayed, or quite taken away, for such a surmise may be made in every case; and the plaintiff in the ecclesiastical court cannot have any good answer to it to have a consultation. Which agrees with the resolution in the principal case, &c.

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M. 8 Ja. A.D. 1610. B.R.

Hunston v. Cocket. [Cro. Ja. 252.]

DEBT upon the statute of 2 *Ed.* 6. for not setting out tithes: the jury find a special verdict, that a prior was seised of the advowson of this parsonage, &c. 24 *H.* 8. the church being then void, the bishop gave him licence to hold it in proper uses; and that there was not any endowment of the vicarage: and they find the statute of 4 *H.* 4. of appropriations, and the statute of 27 *H.* 8. which gives priories and religious houses to the king; and that the king presented the plaintiff by lapse, who was admitted, instituted, and inducted; and that the defendant did not set out his tithes, *et si*, &c. The points intended were, whether the appropriation was good, there being no endowment of the vicarage; and whether this statute, being in the affirmative, (that vicarages shall be endowed,) makes all appropriations void, unless there be a vicarage endowed; and whether on appropriation by the bishop's licence without the king's licence be good. But *Williams* said, it hath been resolved; that whether appropriations be good or not, cannot now be called in question; for they shall be intended to be good, and to have all requisite circumstances; and the statute gives them to the king, and doth not except any man's right, unless theirs only who had right at that time, which no parson now hath. But this case was without argument adjudged for the defendant; for the *plaintiff claims *per presentationem regis ratione lapsus*: whereas it appears, if the king had any title to present, it was *jure coronæ*, and so the presentment merely void; and it is an admission, institution, and induction, without any presentment; which is merely

Appropriation good though the vicarage not endowed.

Presentment by the king for lapse when he is patron is void.

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1610. void, as it was adjudged between *Green* and *Baker*, *quod vid.* (a)
Hastons v. *Cocket.* Wherefore for this cause, it appearing that the plaintiff had not
 (a) 6 Co. any title, it was adjudged for the defendant. (b)
 30.

M. 10 Ja. A. D. 1612.

Priddle v. Napier. [11 Co. 8. b.]

- 2 Brownl. IN an attachment upon a prohibition in the common pleas by
 25. *John Priddle qui tam, &c.* against *Thomas Napier* gentleman,
 2 Ro. Abr. proprietor of the rectory of *Tintenhul* in the county of *Somerset*, the
 320. pl. 4. plaintiff declares, that whereas one *Robert Shirburne alias Whitlocke*,
 S. C. late prior of the priory of *St. Peter and Paul the Apostles*, of *Montacute*, in the county of *Somerset*, *ordinis Cluniacensis*, was seised of twenty-two acres of land, called *Perins-Hill alias Guilberts-Hill*, in *Tintenhul*, in the said county, and of the rectory of *Tintenhul*, *eidem prioratui pertin' et spectan', ac parcel' eidem priorat' existen'* in his demesne as of fee in the right of the priory, and that the said prior and all his predecessors, priors of the said priory, before the dissolution of the said priory, and at the time of the said dissolution of the said priory, were rectors of *Tintenhul* aforesaid, and had and held the rectory aforesaid, *simul et semel* with the said twenty-two acres of land, *in manibus suis propriis in jure prioratús sui prædicti, ratione cujus idem nuper prior et omnes prædict' alii priores ejusdem nuper prioratús per totum tempus prædictum ante prædictum tempus dissolutionis prioratús illius, usque ad tempus dissolutionis, &c. habuerunt et tenuerunt, ac idem nuper prior tempore dissolutionis, &c. habuit et tenuit prædictas viginti et duas acras terræ exonerat', acquietat', et immunes de omnibus et omnim' decimis, &c.* and that 20 *Martii an 30.* the said prior and convent by their deed enrolled in chancery, gave, granted, and surrendered the said priory, the said rectory, land, and all the possessions thereof, to king *H. 8.* his heirs and successors; and that by force thereof, and of the statute of 31 *H. 8.* of dissolutions, king *H. 8.* was seised of the said rectory, and of the said land in his demesne as of fee, as in the right of his crown; and shewed the clause of the statute of 31 *H. 8.* of discharge of payment of tithes; by force whereof, king *H. 8.* was seised of the
 [237] said 22 acres of land, &c. discharged of payment of tithes, and conveyed the inheritance of the said 22 acres to sir *Thomas Freke* and others; who *anno 38 Eliz.* demised the same to the said *John Priddle* for 99 years, if three of his sons or any of them should so

(b) See *Grymes and Others, v. Smith*, 12 Co. 4. *supra*, p. 158. *Alden v. Twchill*, *infra*, p. 436. Stat. 15 Ric. 2. c. 6. p. 10. Stat. 4 Hen. 4. c. 12. p. 13, 14.

long live; and averred their lives, and that the defendant *propriarius rectorie prædictæ*, &c. before the bishop of *Bath and Wells* sued the plaintiff for tithes of corn growing in the 22 acres of land, &c. *Et præd' Thomas Napier pro consultatione habendâ* alleged a grant by letters patents of queen *Elizabeth*, *anno regni sui secundo*, of the said rectory to *Rive and Evelyn*, and to their heirs; and by mean conveyance conveyed the said rectory to the said *Thomas Napier* in fee, and that he libelled for the said tithes, as he lawfully might; *absque hoc quod prædictus prior et omnes prædecessores sui priores præd' nuper prioratûs a tempore cujus contr' memoria hominum non extitit ante tempus dissolutionis*, &c. *nec-non usque ad tempus dissolutionis*, &c. *habuerunt & tenuerunt prædict' viginti & duas acras terræ exonerat', acquietat' & immunes de omnibus & omnimodis decimis quibuscunque super prædict' vigint' & duas acras terræ quovismodo provenient', &c. prout*, &c. *& hoc*, &c. *unde petit iudicium, & breve dicti domini regis de consultatione sibi in hac parte concedi*, &c. Upon which issue was joined, and the jury before the justices of *nisi prius* gave a special verdict, that the prior and his predecessors, *a tempore cujus*, &c. until the time of the dissolution, were seised of the said 22 acres of land in their demesne as of fee as in the right of the said priory; and that one *Thomas*, late prior of the said priory, was seised of the advowson of the said church of *Tintenul* in fee in the right of his priory: and he being so seised *H. 8.* the 8th day of *May*, in the 20th year of his reign, by his letters patent (the exemplification of the enrolment of which under the great seal they set forth), *De gratiâ suâ speciali ac certâ scientiâ et mero motu suis licentiam dedit præfat' Tho' tunc priori nuper prioratûs, et ejusd' loci conventui et successoribus suis, quod ipsi et successores sui dictam ecclesiam parochialem de Tinten' præd', impropriare, consolidare, incorporare, annectere, et unire, et eam sic appropriat', consolidat', incorporat', et unitam, in proprios suos usus tenere possint*; with proviso to endow a vicarage, and that a competent annual sum should be distributed to the poor, with the usual *non obstante*; and that *John* bishop of *Bath and Wells*, ordinary of the said place, 4th *Sept.* 1529, by indenture tripartite, *viz.* one part sealed with the seal of the said bishop, the other part sealed with the seal of the prior and convent of *Bath*, (which confirmed the said indenture), and the * third part sealed with the seal of the dean and chapter of *Wells*, (which also confirmed the said indenture), *Ecclesiam parochialem de Tintenul dictæ nostræ diœcesis et sui patronatûs (ut asserunt) dictis priori et conventui et successoribus suis et domui sive prioratui suo prædict' cum consensu pariter et assensu metuendissimi in Christo principis et domini Henrici octavi Dei gratia*, &c. *autoritate nostra ordinaria annectimus, appropriamus et unimus per præsentés, ita quod cedente vel decedente rectore ejusdem ecclesiæ parochialis qui nunc est, seu*

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The prior of Montacute was seised of an advowson, and of certain lands; and 20 H. 8. the king licensed him to appropriate it. 21 H. 8. the ordinary assented. Afterwards the church became void, that the prior might hold it appropriate. 27 H. 8. the incumbent died, and the appropriation took effect and was united to the possession of the rectory appropriate, and also of the land out of which tithes were due to the said prior in respect of the rectory. Then by st. 31 H. 8. the priory is dissolved, and the impropriation given to one, and the lands to another; and the question is, whether the patentee of the lands shall hold it discharged of the payment of

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tithes in re-
spect of that
unity.

aliter ipsa ecclesia quovismodo vacari contigerit, liceat ipsis priori conventui suisque successoribus per se vel per alium seu alios ipsorum nomine possessionem dictæ ecclesiæ parochialis autoritate propriâ intrare, &c. et in proprios usus convertere et imperpetuum retinere: with endowment of a vicarage, and provision for an annual sum to the poor: and afterwards the then parson of the said rectory died; after whose death the said *Thomas*, prior of the said priory, into the said rectory entered, and was, as well of the said rectory as of the said 22 acres of land, seised in his demesne as of fee in right of the said priory: and afterwards the said prior *Thomas* died, and prior *Robert* succeeded him: and that the said prior *Thomas*, and prior *Robert*, ever after the said appropriation, held the said rectory with the said 22 acres of land in their own hands, *simul et semel*, in the right of the priory, and found the surrender of the said priory; and that the said king *H. 8.* 24 die Julii anno 36 *H. 8.* by indenture under the seal of the court of augmentation demised the said rectory to *William Petre*, doctor of law, for 21 years, who assigned it over to *Edward Napier*, and that no tithes were paid until the second year of queen *Mary*, and then the said *Edward Napier* had a sentence in the court of audience against one *Thomas Guil*, then farmer of the said 22 acres; and that after the said sentence, until the 8th year of queen *Elizabeth*, tithes were paid of the said 22 acres, and conveyed the said rectory from king *H. 8.* by mesne descents to queen *Elizabeth*, and by the said letters patent and divers mesne conveyances to *Napier*: *et utrum super tota materia, &c. præd' Robertus nuper prior et omnes prædecessores sui priores ejusdem a tempore cujus contrar', &c. ante tempus dissolutionis, &c. necnon usque ad tempus dissolutionis, &c. habuerunt et tenuerunt prædict' 22 acras terr' exonerat', acquietat', et immunes de omnibus et omnimodis decimis quibuscunque, &c. Juratores penitus ignorant, et petunt advisamentum curiæ in præmissis, et si, &c.* And this case was oftentimes argued at the bar by the

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serjeants, and now this term it was argued at the bench. And in this case these points were resolved:

1. That the information upon which the prohibition was granted was sufficient in matter: for although every parish church is supposed to be presentative, and the incumbent ought to come in by admission, institution, and induction; yet the plaintiff in this case may prescribe, that the prior and his predecessors *a tempore cujus, &c.* have been rectors of the said church; for that amounts that it was inappropriate, &c. and the beginning of a thing done before time of memory, cannot be known, *viz.* whether it came by union or impropriation. And therewith agrees 21 *E. 4.* 65. *a.* where, in trespass for certain cart-loads of oats taken at *Bodmin*, against the prior of *Bodmin*, the defendant said, that the corn was

growing in a certain place in *B.* in the parish of *B.*, of which parish he is *persona impersonata*, *i. e.* incumbent; and he was driven to shew how he came to the same parsonage; wherefore he alleged title by prescription, and how the corn was severed from the nine parts, and that he took it, and that was allowed for a good title to the rectory. Wherefore, as to this point, the information was resolved to be good; but the addition of the impropriation, &c. had made it without question. It was also holden, that the conclusion of the prescription of the unity, *viz. ratione cuius*, the prior held the said land discharged of tithes, was not formal; for in truth, by the unity (as it shall appear after) the land was not discharged of tithes, but of payment of tithes; and so are the words of the statute of 31 *H.* 8. (as also shall be after shewed.) But yet it seems, that forasmuch as the prescription itself is well alleged in substance, so as the foundation of the prohibition is good, that the misprision of the conclusion and consequence thereupon shall not be a cause to grant a consultation.

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2. That the defendant's plea *pro consultatione habendâ* (for he is in a manner an actor) was insufficient, because he has traversed a thing not traversable; for the prescription of the unity ought to have been traversed, and not the conclusion, *viz. ratione cuius*; and that for divers reasons; one as in logick, the conclusion of a syllogism cannot be denied, but the *major* or *minor* proposition; so it holds in law, which is the perfection of reason: and therefore in a *præcipe*, if one pleads, that the manor of *Dale* is ancient demesne; and the land in demand is parcel of the manor, and so ancient demesne; the demandant cannot say, that the land in demand is not ancient demesne, for that is the conclusion upon the two precedent propositions; the 1. That the manor is ancient demesne; [240] the 2. That the land in demand is parcel of the manor; for *sequitur conclusio super præmissis*, and therefore it cannot be denied; and therewith agree 41 *E.* 3. 22. *a.* 48 *E.* 3. 11. *a. b.* and many other books: so in the case at bar, the *major*, where there is a perpetual unity of a rectory and land therein until the dissolution, &c. there, the land is discharged tithes; but here has been a perpetual unity of the rectory of *T.* and the twenty-two acres, *ergo*, the 22 acres are discharged of tithes, this conclusion cannot be denied. 2. It is not only a conclusion, but a conclusion of law, and matter in law shall not be put in issue to be tried by the country; for the rule is, *quod quisque norit, in hoc se exercent*, and therefore, *sicut ad questionem facti non respondent iudices, ita ad questionem juris non respondent juratores*: and if the jury take upon them to know the law, and find the special matter, and mistake the law, the judges of the law shall give judgement on the special matter according to law, without having regard to the conclusion of the jury, who ought

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not to take upon them the judgement of the law; and therewith agree *Pl. Com. Amy Townsend's case, f. 112. b. 114. b. vide 5 H. 7. Carew's case, 12, 13, 14, 15. 9 H. 6. 38. a. 13 H. 7. 22. &c.* and the lord *Berkley's case, Plo. Com. 230. b.* One pleaded a gift to king *H. 7.* and to the heirs male of his body, *virtute cujus* he was seised in fee; the other confessed the gift, *virtute cujus* he was seised in tail, and no traverse to the *virtute cujus*, for the conclusion is the conclusion of the law. 3. The issue is not well joined, 1. because the matter of the discharge is by reason of the unity, which is by force of the statute of *31 H. 8.* and not by the common law, and the issue is joined upon a discharge by the common law, *viz.* prescription in the prior and his predecessors to hold the said 22 acres of land discharged of tithes, which is a discharge by the common law. 2. Every issue ought to consist of an affirmative and a negative, and here is not any affirmative, for that which comes after the *ratione cujus* is not affirmative, or positive alleged, but as a consequence upon the precedent matter, *vide 8 H. 6. 6. a. 36 H. 6. 15. a. b. 9 E. 4. 36. 6 H. 7. 5. b.* and therewith agrees the resolution of the judges in the bishop of *Canterbury's case*, in the second part of my Reports, fol. 48., so that here is not any issue joined of any matter alleged in fact in the information.

Supra 189.

4. Upon the verdict divers points were moved at the bar, 1. If the said impropriation (as it was found) was good or not. 2. If it was good by the common law, if the statute of *35 Eliz. reginae, cap. 3.* has supplied the imperfection of it or not. When the jury find matter sufficient to bar the parson of the tithes, which was not parcel of their charge, nor within the issue, if without regard to that matter a consultation shall be granted. 4. If by the said impropriation and unity, so short a time before the dissolution, which could not be above nine or ten years, it should be such a discharge of tithes as is intended within the statute of *31 H. 8.*

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As to the first it was objected, that the said impropriation was void for two reasons: 1. because the king has made a licence of impropriation of the church of *T. per verba de præsenti tempore*, where it appears, that at the time of the licence made there was an incumbent then of the same church; so that no appropriation could be made *in præsenti*, but *in futuro*, by special words, to take effect after the death of the present incumbent; for as no appropriation can be made of a church which is full of an incumbent, but in a special manner to take effect after the death of the incumbent, so the king's licence (without which the appropriation cannot be made) ought to be special also, otherwise the king is deceived in his grant, and by consequence the appropriation is void; and that no appropriation can be made without the king's licence, *vide sir Will.*

Supra 186. Ethingham's case, in 17 E. 3. 39. a. and Plow. Com. in Grendon's

case, *f.* 495. *b.* And that in such case the appropriation ought to be made in such special manner appears in *Grendon's* case, and in 8 *Elix. Dyer* 244. *pl.* 60. The 2d reason was, that the appropriation in the case at bar was made to take effect in possession, and not in such special manner after the death of the incumbent, as it appears before it ought by the law.

But it was resolved, that the appropriation was sufficient in law; for it is true, that the licence is general, and therefore it shall be taken in such sense, that it may take effect, and that is, to be appropriated after the death of the incumbent: and when the letters patent may be taken to two intents good, in many cases they shall be taken to such intent as is most beneficial for the king; but if the letters patent may be taken to one intent good, and to another intent void; then for the king's honour, and for the benefit of the subject, they shall be taken in such manner that the king's grant shall take effect; for it was not the king's intention to make a void grant, and therewith agree 21 *E. 4.* 44. *b.* and *Roger* earl of *Rutland's* case, in the eighth part of my Reports, fol. 56. *a.*, which is proper to be perused, and in the lord *Stafford's* case, in the same part, fol. 77. *a.*, and the case of sir *J. Molins*, in the sixth part of my Reports, 6. *a.*, and the lord *Chandos's* case, in the same part, fol. 55. *b.*, and the earl of *Cumberland's* case, in the eighth part of my Reports, fol. 167. *a.* And so it was resolved in the principal case, that the licence shall be taken to this intent, to make the appropriation to take effect after the death of the present incumbent; and *eo potius*, because the letters patent were *ex certâ scientiâ et mero motu*. And therewith agrees a record in the book of entries, *tit. quare impedit, division' appropriation*, where the licence of appropriation was general, and the appropriation after the death of the incumbent in these words, *volens et concedens ut cedente vel decedente ipsius ecclesiæ nunc rectore, quod prædictus abbas et conventus ejusdem ecclesiæ corporalem possessionem apprehenderent, ac fructus, proventus et obventiones perciperent et libere haberent*. And *vide in eodem libro, tit. Droit 1.* As to the second reason, that is mistaken; for it appears by the instrument of appropriation found within the record, that it was by express words to take effect after the death of the then incumbent, *ita quod cedente vel decedente rectore dictæ ecclesiæ qui nunc est, &c.* Another reason was added, that inasmuch as always the king's licence of appropriation is made to the body spiritual, to which the church shall be appropriated, and not to the bishop, &c. therefore it shall be presumed, that they would obtain it in such form that it should avail them. Also the licence of appropriation is always general, and so are all the precedents; for although the rector be alive at the time of the making of the licence, he may die, or resign, &c. before the appropriation.

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As to the second point, admitting the said appropriation had been void, it was objected, that the said act of 35 *Eliz.* has made it good; for thereby it is enacted and declared, "That all manors, lands, tenements, and hereditaments, which at any time heretofore were the possessions of any abbey, monastery, priory, &c. which after the said fourth day of *February*, in the 27th year of *H. 8.* were granted or conveyed, or mentioned to be granted or conveyed, in or by any letters patent whatsoever, made by the said late king *H. 8.* to any person, &c. were and shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real possession of the said late king, and of his heirs and successors, at such time as the same were granted by the said late king." And where it was answered by the plaintiff's counsel, that the said act of 35 *Eliz.* extended only to letters patent made by king *H. 8.* and the letters patent in the case at bar, were made by queen *Elizabeth*, and so out of the said act of 35 *Eliz.* it was resolved, that in truth the said act of 35 *Eliz.* did not extend to this case, but not for the cause alleged by the plaintiff's counsel; for although it is true, that queen *Elizabeth* granted the inheritance of the said rectory, yet it appears by the special verdict, that king *H. 8.* by his letters patent indented had demised the said rectory to *William Petre*, doctor of law, for 21 years: and the act of 35 *Eliz.* enacts, "That all manors, lands, tenements, and hereditaments, mentioned to be granted or conveyed in or by any letters patent whatsoever, made by king *H. 8.* to any person or persons, bodies politick or corporate, shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real possession of the said late king, and his heirs and successors;" in which purview four things were observed: 1. The favourable penning thereof, *sc.* mentioned to be granted, although in effect nothing passed by the grant. 2. The generality of the words. First concerning the quality of the letters patent, *sc.* in or by any letters patent whatsoever, be they under the great seal, the exchequer seal, the court of augmentation seal, the dutchy seal, &c. Secondly, concerning the estate or interest which is mentioned to pass by the letters patent, which is left at large, and not restrained to any in certain; and therefore if the letters patent purport a grant for life, or for years, the statute hath as great operation, as to the purview of the act, as if the letters patent had purported a grant of an estate tail, or a fee. 3. The generality of the purview, for it extends not only to make the grant good, but to vest the manors, lands, tenements, and hereditaments of the late abbots, &c. in the actual and real possession of king *H. 8.* 4. And not only in king *H. 8.* but in him, his heirs and successors, so that the lands

shall be as well vested in the king, his heirs and successors, when the king grants the land for life or years, as where he grants it in fee-tail or fee-simple: and so the purview extends to three other cases. 1. Where any such lands, tenements, or hereditaments, "came to the hands or possession of the said late king H. 8. 2. Or which were put in charge to or for his highness in his court of exchequer, or any other courts of his majesty's revenue. 3. Or by any auditor, or other officer of the said late king;" and in every of these cases the purview hath so great operation, as in cases of letters patent to vest such lands, tenements, or hereditaments, in the king, his heirs and successors. But yet it was resolved, that the said act of 35 Eliz. c. 3. did not extend to this case; for the purview has a qualification or restraint which has not been mentioned before at the bar; and that is, that in the said four cases, such lands, tenements, and hereditaments, "shall be reputed, taken, and adjudged, in the actual and real possession of the said late king, his heirs and successors, at such time as the same did so come to his majesty's hands or possession, or were so put in charge or granted, or conveyed by the said late king H. 8. as aforesaid; (then comes the qualification or restraint,) notwithstanding, 1. any defect, want, or insufficiency of or in any surrender, grant, or conveyance of the said manors, lands, tenements, or hereditaments, or any part thereof, to the said late king H. 8. 2. Or any other matter or cause whatsoever, by which his highness was or might have been entitled to the same:" so that the scope and purpose of the act was to vest in king H. 8. all the lands, tenements, and hereditaments which the abbots, &c. had, notwithstanding the defects aforesaid. But, if the said appropriation was void, and was not given the king by the statute of monasteries, then the prior of *Montacute*, in the case at bar, had nothing in the said rectory, but the advowson only, and *jus præsentandi*: but yet the said act of 35 Eliz. is of great use and effect, for inasmuch as the statute of 31 H. 8. gave not the king any monasteries, priories, &c. but only such as had been surrendered, granted to the king, &c. or were dissolved; or as should be surrendered, granted, &c. or dissolved; this act, in the said four cases, has supplied the defect or want of a surrender, grant, or conveyance, also of an insufficient surrender, grant, or conveyance, so that be there any conveyance to the king, or not, and if any be, although it be insufficient, the said lands, tenements, and hereditaments, are actually vested in the king, his heirs and successors. 2. If the abbot, prior, &c. had been disseised, or in any other case, where an office, *scire facias*, seizure, &c. was requisite to vest the possession in the king; there the latter words, viz. "or any other matter or cause whatsoever, by which his highness was or might have been entitled to the same," supply all such

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means by which the king might have been lawfully entitled, and put in actual possession. *Vide* 33 *H. 8. Brook, tit. Chose in Action* 14. the question there made, where an abbot, &c. was disseised, well explained and resolved. But although there be defect in the appropriation, yet (if the rectory be in reputation appropriate, and so has been used) it is given the king by the statute of 27 *H. 8. c. 38.* or 31 *H. 8. c. 13.*, and therefore in 19 *Eliz.*, in the dean of *Paul's* case, it was adjudged in the king's bench, that a chantry or college, in reputation and not in law, was given to king *E. 6.* by the statute of 1 *E. 6.* within these words, "all and all manner of chantries, colleges," &c. On 27 *Junii, anno 29 Eliz. in cancellar'* upon an aid prier of the king, by the course of the common law, the case was between the lord *St. John* plaintiff, and the dean and chapter of *Gloucester* defendant, for the parsonage impropriate of *Penmark* in the county of *Glamorgan*; because the patron (who before the appropriation had granted the advowson to the body ecclesiastical, to which the appropriation was made) in *anno 18 R. 2.* was but tenant in tail, and yet it always continued as a church appropriate; and it was resolved by sir *Thomas Bromley*, lord chancellor of *England*, *Gilbert Gerrard*, master of the rolls, *Shute* and *Windham* justices, (whom the lord chancellor in that case associated unto him,) that this rectory in reputation was given to the king by the statute of monasteries. Another case was, *Tr. 30 El. in camera scacc' inter T. Grimes and H. Smith*, for the parsonage of *Bulbenham*, in the county of *Leicester*, which, *anno 22 E. 4.* was appropriated to the abbey of *Sulby*, and no vicar endowed there, &c. according to the purview of the acts of 4 *H. 4. 12.* 15 *R. 2. 6.* But there had continued a vicar in reputation, and the rectory had continued also as appropriated; and it was resolved, that that rectory was given to the king by the statute of monasteries. *Hill. 4 Jac. reg. in cancellar' inter Bedel and Bear*, for the church of *Kumbalton*, which was appropriated in *anno 40 E. 3.* and the defect was, that *Humphrey de Bohun* earl of *Hereford* (who granted the advowson of the said church to the body ecclesiastical, to which the appropriation was made,) was but tenant in tail; and resolved clearly, that it was given to king *H. 8.* by the statute of monasteries. *Nota* reader, In the statute of monasteries there is a saving of rights, &c. but the founders, donors, &c. are excepted out of the saving; so they are bound by the body of the act.

As to third point upon the verdict, it was resolved, that forasmuch as the special matter found by the jury was not parcel of their charge, nor pertinent to the issue, (admitting that the special matter had been sufficient to have barred the plaintiff of the tithes,) it should not be regarded; for the party grieved thereby cannot have attain, nor the witnesses punished for perjury by the statute

of 5 *EL.* because neither the saving of the jury, nor the testimony of the witnesses, was material to the issue; so that inasmuch as the issue is joined upon prescription in the prior and his predecessors, to hold the said 22 acres discharged of tithes *a tempore cujus*, they cannot give in evidence a unity of the rectory and land for 10 years only; that if any colour should be, that the same should be a discharge, it is not a discharge by prescription *a tempore cujus*, &c. by the common law, but by the statute of 31 *H. 8.* So that for the insufficiency and impertinency of the points and parts of this prolix record, the other justices did not speak to the fourth point of the verdict. But the chief justice (for the better direction of this and such other cases) did declare, that the point had been resolved before, and the causes and reasons of the resolution thereof. It was a long time, in all the courts at *Westminster*, a great question upon the said branch of the statute of 31 *H. 8.* and the cause of the doubt thereof stood upon two considerations: 1. Upon consideration of the nature and quality of tithes before the said act. 2. Upon the words and purview of the said branch of 31 *H. 8.* And as to the first, *quota pars*, i. *decima pars*, which we call tithes, is an ecclesiastical inheritance collateral to the estate of the land, and of their proper nature, due only to an ecclesiastical person by the ecclesiastical law, and therefore no unity of possession can either extinguish or suspend them; but they, notwithstanding any unity, remain *in esse*, so that they may be demised or granted to any spiritual man, notwithstanding any such suspension. Tithes are more collateral to land than a warren, which the owner of the land has in it; for, by feoffment of the land, without excepting the warren, the warren is extinct, as it is held in 35 *H. 6.* 56. *a.* But, if a prior, who has a parsonage impropriate, enfeoffs another part of the glebe, yet he shall have tithes, against his own feoffment, as it is held in 42 *E. 3.* 13. *a.*, and they are not like a leet; and yet if the lord of a leet purchases land within it, his leet is not suspended, nor (if he makes a feoffment of the said land) is his leet in it extinct, as it is held in 7 *E. 2.* *tit. Avowry* 211. and 8 *Ed. 2.* *ibid.* 212. But he has an inheritance by the common law in the leet, which is descendible, and which he may grant over to whom he pleases: but such inheritance a layman cannot have in tithes by the common law, neither shall they pass by such words as temporal inheritances shall pass, and therefore *Mich. 31 & 32 EL.* in a prohibition betwixt *John Parkins* and *Thomas Hinde* parson of *Babington* in the county of *Somerset*, the case was, that the said parson by deed indented leased his glebe *cum proficuis et commoditatib' eidem spectantib'* for 95 years, rendering rent *pro omnibus exactionib' et demandis quibuscunque dictæ rectoriæ pro clauso prædicto spectantibus*; and the question was, if the lessee should have the said close

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- 1612: discharged of tithes during the term: and it was resolved *per totam curiam*, that the tithes should not pass by such general words, and
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 * [247] as they are tithes not severed, they are merely ecclesiastical; for the subtraction of which no remedy lies by the common law. If a parson purchases land within his rectory, and leases this rectory, the lessee shall have tithes of the land purchased, and therewith agrees 30 H. 8. *Dyer* 43. pl. 21. *Vide* 32 H. 8. *Brook, tit. Dismes*, 17. Then inasmuch that if tithes be considered of themselves before the severance of them, they are merely ecclesiastical, and so collateral to the estate of the land, that no unity can extinguish or suspend them, but notwithstanding any unity, they remain *in esse*; now the words of the act are to be considered, which are, “ that “ as well the king, his heirs and successors, as all and every such “ person and persons, their heirs and assigns, which have, or here- “ after shall have any monasteries, parsonages appropriate, or “ other hereditaments, &c. shall have, hold, retain, keep, and en- “ joy, as well the said parsonages appropriated, &c. messuages, “ lands, tenements, and other hereditaments, &c. discharged and “ acquitted of payment of tithes, as freely and in as large and ample “ manner as the said late abbots, priors, &c. had held, occupied, “ possessed, used, retained, or enjoyed the same at the days of their “ dissolution:” and upon these words, forasmuch as the unity doth not discharge nor suspend the tithes, but that they were *in esse* at the time of the dissolution: and forasmuch also as these words (discharge and acquit) imply actual immunity and freedom; and that the king and his patentees shall not have them discharged and acquitted absolutely, but *sub modo*, that is to say, “ in as large “ and ample manner, &c. as the said late abbots, &c.” and the late abbots held not the said lands in case of unity discharged, but charged with the payment of them; for these reasons, in short, it was doubted, whether the said act should extend to the case of a perpetual unity; and it was also urged, that if the said act of 31 H. 8. in case of perpetual unity should, in respect thereof, discharge the land of tithes, it would do a wrong; and as it is said in *Plo. Com.* in the earl of *Leicester's* case, 398. b., the parliament is a court of the greatest honour and justice, of which none ought to imagine a dishonourable thing; and the *Doctor and Student*, fol. 165. cap. 55. It cannot be thought, that a statute that is made by authority of the whole realm, as well of the king, and of the lords spiritual and temporal, as of all the commons, will recite a thing against the truth, &c. And *Fortescue* c. 18. *prudencia etiam et sapientia necessario statuta hujus regni referta putandum est, dum non unius aut centum solum consultorum virorum, sed plusquam trecentorum electorum hominum, quali numero olim senatus Romanorum regebatur, ipsa sunt edita.*
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But at length, upon great consideration, it was resolved and adjudged, that a perpetual unity *a tempore cujus*, &c. till the dissolution, should be *prima facie* a discharge of the land of payment of tithes, by force of the said branch of 31 H. 8. c. 13. for divers reasons. 1. The statute doth not say discharged of tithes, but discharged of payment of tithes, and for divers other reasons, the chief of which was, for the infinite impossibility and impossible infiniteness, so that such immunities and discharges as religious houses had before time of memory cannot be known. And it was expressly resolved, that a general allegation of unity at the time of the dissolution, &c. without an averment that it was perpetual, was not sufficient: and although it had been a perpetual unity, yet, if the farmers of the lands of the rectory had paid tithes before the dissolution, then the intendment and presumption of law upon the perpetual unity failed: and all this you may see in the archbishop of *Canterbury's* case, in the second part of my reports, and divers judgements and resolutions there cited, fol. 48. & 49. So that such unity as is within the said branch of the act of 31 H. 8. ought to have four qualities. 1. *Talis unitas* (a) ought to be *iusta*, rightful and not by wrong. 2. It ought to be *equalis*, s. fee in the one and the other; for if the abbots, priors, &c. have held by lease, *a tempore cujus*, &c. that is not a unity within the statute. 3. It ought to be *perpetua a tempore cujus*, &c. 4. It ought to be *libera*, free of payment of any tithes: but, if their farmers at will, for years, &c. have paid tithes to them, (as hath been said,) the unity perpetual will not serve. But it was asked, What if the appropriation was made in the times of E. 4. H. 6. H. 4. R. 2. E. 3. &c. and yet in law within time of memory, and unity had continued from the time of the appropriation until the dissolution, and tithes were never paid, neither by the abbots, &c. nor their farmers: should not the statute extend to those cases? and it was answered, No, upon the point of unity; for if he will take the aid of the act of 31 H. 8. the unity, as hath been said, ought to be perpetual. But in such case he may allege the said branch of the act of 31 H. 8. concerning the discharge of payment of tithes, &c. and that the abbots, &c. *a tempore cujus*, &c. until the dissolution, have held the land discharged of tithes, (as he may well prescribe by the common law,) and give such evidence that he may approve it: and so, if in truth the land be discharged, he has sufficient remedy to relieve himself. *Vide* the [249] bishop of *Winchester's* case, in the second part of my Reports, fol. Supra 167.

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Supra 189.

What are
the requi-
sites of an
exemption
by unity of
possession.

(a) *Gibson v. Holcroft*, Yelv. 31. *supra*, p. 222.
Blade v. Drake, Hob. 395. *infra*, p. 390. *Lam-
prey v. Rooke*, Ambl. 291. *infra*, p. 859. *Clavill*

v. Oram, *infra*, p. 1354. *Prouse v. Dr. Leyfield*,
infra, p. 264.

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44. b. 45. a. But, if the abbey or priory, &c. was founded within time of memory, then he cannot prescribe *omnino*; and forasmuch as in the principal case, the appropriation was made in 20 H. 8. so that it appeared to the court, that before that the 22 acres were charged with tithes; for of common right all lands ought to pay tithes; for that reason the chief justice concluded, that the said 22 acres were, as this case is, chargeable with tithes. But, if the parties are not satisfied with it, they may begin again. For inasmuch as the information, as it is resolved, is good; and the plea, *pro consultatione habenda*, altogether insufficient; and the verdict impertinent to the issue, they would not grant a consultation; and thereunto the whole court agreed.

Hil. 10 Ja. A. D. 1613.

Arnold v. Bidgood. [Cro. Ja. 318.]

Grant of
totum jus
suum in de-
cimis passes
a lease of
them which
the grantor
has in right
of his wife.
2 Bulstr.
65. S. C.
3 Wils. 278.
& 2 Bl.
Rep. 801.
S. C. cited
by De Grey
C. J.

DEBT upon the statute 2 E. 6. c. 13. for not setting out tithes. The case was; a man being possessed of a lease of tithes in right of his wife as executrix to her former husband, grants *totum jus titulum et interesse suum de et in decimis prædictis*. After verdict for the plaintiff (who claimed under the said grant), it was moved in arrest of judgement, that the declaration was not good, because the plaintiff had not set forth any good title to enable himself to the tithes. And the books of 10 E. 4. 1. & 19 H. 6. 40. were cited to the purpose. But the whole court unanimously resolved, that the grant was good, and the lease he had in the tithes in right of his *feme* did thereby pass: for he granted *totum jus, titulum et interesse suum de et in decimis prædictis*. And, by *Doderidge*, the word *suum* doth import a propriety in possession, and is all one as if he had specially named the same in the grant; nor could it be more certainly named or expressed. There was then an objection made out of the proviso in the statute for dissolutions, that all leases made by any abbot within a year before the dissolution, should be void; and this lease was pretended to be so, and therefore void. But it was thereto answered, that here the issue was only, whether he were discharged of tithes or not: and the jury gave their verdict directly, that at the time of the dissolution there was not any discharge of tithes: and this lease being but an inducement only to the title of the plaintiff, the issue therefore is well enough. But, if in this case there had been any mispleading or mistrial, the court held clearly it was aided by the statutes of 32 H. 8. & 18 Eliz. cap. 14., and cannot be quashed after verdict; whereupon judgement was given, and entered for the plaintiff.

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P. 11. Ja. C. B. A. D. 1614.

Urrey v. Bowyer. (a) [MSS. Calthorpe.]

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BOWYER libelled in the spiritual court against *Urrey* for tithes of corn. *Urrey* suggested that the lands of which the tithes were demanded were in the hands of *Richard Weston* prior of *St. John's* of *Jerusalem* in *England* and of his brethren, and that they were discharged of tithes in their hands: he then shewed that all the lands were given to the king by the statute of 32 *H. 8. c. 24.* and pleaded that statute which gives to the king all immunities, privileges, jurisdictions, &c. which the prior or any of his predecessors had; and set forth farther that the king by his letters patent granted these (the said lands) to the now plaintiff in prohibition, with a clause therein that he should have *tanta, talia, tot immunitates, privilegia, &c.* as any one had had theretofore, &c. and so he prayed a prohibition. Upon this suggestion in the prohibition *Bowyer* demurred. And *Coke C. J.* argued that the suggestion was insufficient, and that these lands ought to be charged with tithes, and could not be discharged thereof. And of that opinion was *Nicholls J.* But *Warburton* and *Winch* held, that the lands ought to be discharged of tithes; and their reason principally was, for that the statute of 32 *H. 8. c. 24.* revives all privileges, jurisdictions, immunities, &c. which the Hospitallers had enjoyed, and they insisted much upon the book of 10th of *Eliz. Dy. (b)* But I heard neither their argument nor that of *Nicholls*, and therefore have not reported them: but I have only reported *Coke's* argument, which I did hear.

Q. Whether the lands of the hospital of *St. John* of *Jerusalem* shall be discharged of the payment of tithes.

Coke held, that the statute of 31 *H. 8. c. 13.* did not extend to [251] the possession of the Hospitallers, because they were dissolved by an act of parliament subsequent to it; and the statute of 32 *H. 8. c. 24.* which revives the immunities and privileges of the dissolved monasteries does not extend to them, because the privilege of being discharged of tithes is a privilege inseparable from the person of the prior. He said there were four orders that were discharged of tithes by a general council and by a decree of the pope, viz. the Cisterrians, the Templars, the Hospitallers, and the Præmonstratenses; and all other orders were to pay tithes as other persons; and even these privileged orders were to pay tithes *de terris de novo acquisitis*, and as to those were not discharged. And the words of the council are, that the said orders and their successors shall be

(a) The arguments of the counsel in this case are reported in 2 Brownl. 8. 20., but as this question was debated upon several occasions *vario Marte*, and as the report of those arguments is not a very

correct or finished one, I have thought it unnecessary to insert it here. This argument of my lord *Coke* is no where in print.

(b) 277. pl. 60. *Statome's case*, *supra*, p. 152.

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discharged of tithes for their lands so long as they retain them in their own hands. So that it appears by the words of the council, that if the lands be transferred to the hands of any other persons the privilege is gone, and they become charged with tithes again; for the *medium dispositivum* of the bull or council which discharges them of tithes is ecclesiastical; the persons, who are discharged, are ecclesiastical; and the thing itself, whereof the discharge is made, is ecclesiastical. It seems to me then that there is great reason that this privilege should not be transferred to persons who are not ecclesiastical; and for whom none of those reasons can be alleged why they should be discharged of tithes. It is besides a thing that was never seen, that inseparable privileges were either given to the king, or contained within the general words of an act of parliament. Though the statute respecting the Templars made in 17 E. 2. wills that the Hospitallers, to whom the possessions of the Templars were transferred, shall hold by the same tenure and the same services which the Templars held by, yet the immunity of the tenure in frankalmoine was not transferred from the Templars to the prior of the hospital of *St. John of Jerusalem* and his brethren, as was adjudged in 35 H. 6. 56, 57. And yet in that act the words were special; and the persons to whom the transfer was to be made were of the same quality with the persons from whom the possessions were taken. In 3 E. 3. 11. an appropriation is not transferred from the Templars to the Hospitallers, notwithstanding the statute of Templars wills that the prior of the Hospitallers shall have all the possessions which belonged to the Templars; for the appropriation is inseparably annexed in privity to the Templars; and cannot be transferred by the general words of an act of parliament. The statute of 33 H. 8. c. 20. gives all manner of conditions to the king; and yet by force of these general words a condition inseparably annexed to the person of the party attainted is not given to the king, as was adjudged in *Inglefield's case*, 1 Anders. 293. So by that statute a right of action shall not be given to the king, notwithstanding that the statute gives all rights generally; for it is a thing consisting in privity, and therefore shall not be transferred by the general words of an act of parliament, as may be seen in the *marquis of Winchester's case*, 3 Co. 2. So in the case at bar, as the immunity of being discharged of tithes is, so long as the land shall remain in the hands of the Hospitallers, and therefore is inseparable from their persons; for that reason it shall not be transferred by the general words of the act of 32 H. 8. c. 20. Besides, there is no instance of the general words of an act of parliament being extended to tithes. For tithes being a spiritual thing, and due *jure divino*, quoad a competent maintenance, and not *jure humano*, the common law does not take any notice of them in an act of parlia-

ment, which is but a temporal conveyance, and means not to meddle with them. And for this reason it is that there is never any saving in an act of parliament of tithes, though there is a saving of all seigniories, rights, rents, and all other things. For tithes being a thing collateral to the land, and not being a temporal inheritance, are not included within the general words of an act of parliament. And for this reason the statute of 3 H. 5. c. 1. which grants that men shall enjoy their liberties and franchises, does not extend to this, that they shall enjoy the liberty of being discharged of tithes. And so, though the statute of 27 H. 8. c. 28. grants that the king shall have all privileges, &c. and all hereditaments, whatsoever, in as ample and large a manner as the abbots, &c. had them; yet the king by these general words shall not be discharged of tithes; for all the possessions which came to the king by this statute remain charged with tithes at this day.

And here *Coke* said, that though tithes are due *jure divino*, quoad a competent maintenance, yet unquestionably as to the tenth part, and neither more nor less, that is due *jure humano*, and by the constitution of man. And he said that tithes are not assets, nor are they extinguished by a feoffment of the land, nor is a common person capable of them at common law; and that so it appeared by what had been said, that the statute of 32 H. 8. does not extend to an immunity which is inseparably annexed to the person.

It is now to be inquired, whether that statute extends to a privilege which is ecclesiastical and spiritual, and not temporal. And as to that, he said, the statute extends only to the reviving of the temporal franchises, and not the spiritual ones. For if it should extend to the spiritual liberties, then a great inconvenience would ensue, because by this means all the possessions of the Templars would be exempt from all temporal jurisdiction as they were when they were in the hands of the Hospitallers, as may be seen in 1 E. 3. 8 & 31 E. 3. *Triall* 99. where it is holden that profession alleged in a plaintiff of the order of Templars cannot be certified by the bishop, because the order is exempted by the pope from episcopal jurisdiction. And if they had all ecclesiastical privileges which the Templars had, this would bring a great inconvenience to the commonwealth, a greater indeed than a man would imagine. For the Templars had many great immunities bestowed upon them by the pope and councils, which immunities they might as well claim as to be discharged of tithes; and therefore because the law forbids those who have now their possessions to claim those privileges, it will also forbid them to claim the ecclesiastical privilege of being discharged of tithes. And as to the 3d privilege, which is a privilege of discharge, and not in being, he said, that the statute of 32 H. 8. c. 20. does not extend to it; for the statute says,

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that *the privileges, &c. shall be actually and really in the king, his heirs and successors*; and a privilege of discharge, which is not *in esse*, cannot be actually and really in the king. Besides, the statute says, that *all franchises, &c. of what nature soever they may be, lawfully had, used, and exercised, &c.* but a franchise of discharge cannot be used or exercised, because it is not *in esse*, and therefore the statute does not extend to it. In 7 H. 6. 8. where the abbot in a writ of cosinage brought against him pleaded to the jurisdiction of the court, because the lands lay within the abbey of Westminster, which is a privileged place, the plea was disallowed, the privilege and immunity extending to the person only, and not to the lands or goods. According to 11 H. 4. 35. though the prior of St. John's were discharged of taxes and subsidies in respect of his person, yet the occupiers of the lands shall not be therefore discharged, because the discharge was solely in respect of the person, and not in respect of the lands. In 38 & 39 of Eliz. in the case of the lord Darcy it was adjudged, that where the king granted to the dean and chapter of Paul's and their successors that they should be discharged of purveyance in their manor of D. and the manor was afterwards surrendered into the king's hands in 33 H. 8. the king's patentee should not be discharged of purveyance, though the patent ran that he should have *tot, talia, et tanta privilegia, franchises, libertates, &c. quot, qualia, quanta aliquis habuit*; for this discharge of purveyance is a personal thing, and not *in esse*. 1 H. 7. 25. a grant was made to the abbot of Abington that he should be discharged of episcopal jurisdiction: in that case it would be absurd to say, that he who should have the possessions of this abbey, should have the privilege of discharge. 20 E. 3. *Recommencement*, the abbot of E. had the privilege of being exempt from any ordinary jurisdiction; here the statute of 32 H. 8. would not revive this privilege, because it is a privilege of discharge, and a personal privilege. In 44 and 45 Eliz. in a *quo warranto* brought

it was adjudged, that a privilege of being discharged from the government of the mayor and aldermen in London, was not revived by the statute of 32 H. 8. so that the defendants, claiming under a dissolved monastery, could not claim all franchises. F. N. B. 227. Reg. 259. we see that all ecclesiastical persons were discharged of toll, murage, pontage, &c.; yet the persons who have the possessions of those ecclesiastical persons shall not be discharged of them; for it is a personal privilege, and a privilege not in being. The statute* of 14 E. 3. c. 1. *st. pro Clero*, grants that *ecclesiastical persons shall be discharged of receiving guests or sojourners of Scotland, &c.*; this privilege of discharge does not extend to those who have their possessions, nor is it revived by the statute of 32 H. 8. Whence we see that the statute of 32 H. 8. c. 20. does not revive privileges which go in discharge, and are not *in esse*.

* Vide
Rast. Sta-
tutes, Tit.
Purveyors,
§ 12.

It now remains to examine whether the statute of 31 H. 8. c. 13. can in any way extend to this case. As to that when a thing is out of the body or purview of an act, it shall never come within the branch of it. For how is it possible that there can be sap in the trunk, when there is none in the root? How can it be that this dissolved hospital should be within the branch of the 31 H. 8. which gives immunity from tithes, when it is not within the body of the act? And this dissolved priory of *St. John of Jerusalem* is not within the body of the act, because it was given to the king by an act of parliament passed in 32 H. 8. c. 24. and not by this act. Besides, this statute of 31 H. 8. is very precise in its penning; for it says, that *all houses of religion, &c. which have been dissolved since the 4th of February, &c.* so that the house or priory that would have the privilege of being discharged of tithes within this act, must have come to the king since the 4th of February. And it is for this reason, that this statute does not extend to those priories and religious houses which were dissolved by the statutes of 2 H. 5. c. 9. (a) and 27 H. 8. c. 28. The statute too says, that the said possessions shall be discharged of the payment of tithes; so that the lands, which are to be discharged of tithes within the statute, must be those possessions which came to the king by the statute; for the word "*said*" runs from the branch to the body of the act, so that nothing shall be within the branch which is not contained within the body, and therefore because these lands do not come to the king by the 31 H. 8. they shall not have the immunity of being discharged of tithes. And it is for this reason that neither the lands that come to the king by the statute of 32 H. 8. c. 13. nor those which come to him by the statute of 1 E. 6. c. 14. of chantries, are discharged of tithes by the branch of the statute of 31 H. 8. c. 13. For how can it be intended that the statute should provide for the lands of those houses that might be dissolved thereafter, unless you will say that the makers of the act of 31 H. 8. had the spirit of prophecy? And so it was resolved in the *archbishop of Canterbury's case*, 38 Eliz. 2 Rep. 46. And in the case of one *Greene and Buffkin*, 2 Rep. 49. b. and Hil. 44 Eliz. Rot. 994. in an action on the statute of 2 E. 6. it was the opinion of all the judges except *Gawdy*, that the branch in the statute of 31 H. 8. which gives immunity from tithes, does not extend to possessions given by the statute of 32 H. 8. And so it was ruled in the case of *Quarles v. Spurling*, who were the same parties between whom the action on the statute of 2 E. 6. was depending. As to the case in the 10th of Eliz. Dy. 277. which had been so strongly urged, he said, first, that it was a

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v.
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Supra 189.
Supra 197.

Supra 224.
by the name
of Cornwallis
v. Spurling.
Supra 132.

(a) Not printed in the statute-books; but may be found in Rymer's *Fœdera*, 265, 4. Parliament Rolls, 22.

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Supra 189.

case ruled upon sudden opinions given before the lord chancellor, and not upon solemn argument. 2dly. He said, that the case was in truth upon the order of *Cisterians*, as he had seen by the papers in chancery, though lord *Dyer* states it to be of the order of *Templars*; and by the recital of the act of 2 *H.* 4. c. 4. it appears, that lord *Dyer* understands it so, because the statute of 2 *H.* 4. intends only that the farmers of the Cisterian order pay tithes, and does not speak of the order of *Templars*; and the Cisterian order are clearly discharged of tithes, because their lands came to the king by the 31 *H.* 8. But admitting the case to be as it is stated in the book, yet inasmuch as there have been four judgements adjudged differently upon the point against the book, it is good to abide by the latter judgements, as *Plowden* saith. And here *Coke* said, that such possessions as are discharged of tithes by the branch of the statute of 31 *H.* 8. must have been in the hands of religious and ecclesiastical persons at the time of the dissolution. For if they were in the hands of *religious* persons only, and not of *ecclesiastical* likewise, then such possessions will not be discharged of tithes by that act, because the act always speaks in the copulative, *religious and ecclesiastical*, and not otherwise. But here he said, that the *Templars* were holy persons, who were capable of being discharged of tithes, if there were no impediment in the case. They were both *religious and ecclesiastical*, for an order cannot be religious without being ecclesiastical; though an order may be ecclesiastical, and yet not religious, as a bishop, dean and chapter, archdeacon; they are ecclesiastical, but not religious, because they are not regular, and have not professed themselves, nor vowed three things, *viz.* obedience, voluntary poverty, and perpetual chastity, which things are requisite to such orders as are said to be religious, as may be seen in 2 *Rep.* 48. But the *Templars* are religious, because they are professed persons, as may be seen 35 *E.* 1. *Tryall* 99. 2 *R.* 3. 4. and also 9 *E.* 3. 25. and 26. 12 *R.* 2. *Nonability* 4. 8 *E.* 3. 53. where it is admitted that the prior of the hospital alone shall sue and be sued without naming the brothers, they being dead persons in law. They were also ecclesiastical persons, for they might sing mass, as may be seen in the statute of *Templars*, 17 *E.* 2. which no one could do who was not an ecclesiastical person. So that it appears that they were both religious and ecclesiastical, and of course entitled to the aid of the statute of 31 *H.* 8. if there were no other impediment in the case. And here *Coke* said, that the prohibition is insufficient of itself, inasmuch as the suggestion is, that *the prior of the hospital of St. John's of Jerusalem and his brethren were seised*; whereas it ought to be that *the prior of the hospital of St. John's of Jerusalem was seised*, for the brothers are persons dead in law, who cannot be said to be seised. And therefore we see in 1 *E.* 3. 7. that the prior of *St. John's of Jerusalem* in *England* avowed without making any mention of his

brethren. So in 1 *E. 3. 9.* it is said that the Templars and Hospitallers are professed persons, and their profession shall be tried by the common law and not by the ordinary, because they are out of his jurisdiction. And in 7 *E. 3. 25. 1 R. 2. Nonability 4. 8 E. 3. 53.* the brothers are never mentioned in any suit by or against the prior of the hospital. And here *Coke* took occasion to speak of the first institution of the Templars and of their dissolution. The first institution of the Templars, he said, was to conduct Christians to the Holy Land safe from robbers and pagans, as may be seen in *Matthew Paris*, fo. 67. and as *Pole* says in 9 *E. 3. 25.* the lands upon their foundation were given to the Templars in defence of the Christians against the Saracens; and as
 their institution was *ad defensionem Christianorum terræ sanctæ adversus Paganos et Saracenos.* So that they were a kind of soldiers and *militiæ dediti*, and did not fight with their pen, as other orders did, but with their swords; and they were *gladio cincti*, and always upon the mention of the gospel drew their swords in sign that they were ready to maintain the gospel with their swords; *et fuerunt induti vestimento nigro modo Laicano gerenti signum crucis ante et post*; and as the learned *Camden* tells us, fo. 340., they had in all christendom 9000 manors for their maintenance, as the Hospitallers had 19,000; and they were always entombed together in their complete armour, as the monks were always interred in their clothes. But the Templars, though a religious order, were persons of great impiety; for the emperor Frederick having an intention of going on a pilgrimage to the place where *John the Baptist* preached, they treacherously wrote to the sultan, and gave him notice of it, in order that he might surprize the emperor, and by that means obtain a great ransom. But the sultan, as soon as it was disclosed to him, informed the emperor of it. And the *French* king, in requital, as some say, prevailed with the Pope to dissolve the order; for in a council holden in 1312 at *Vienne*, the pope said, *Quanquam de jure non possumus, tamen plenitudine potestatis nostræ ordinem illum Templariorum reprobramus.* And in consequence of this decree made by the Pope at that council, the whole order was dissolved in *England* by the statute of 17 *E. 2.* But the true cause of their dissolution is to be traced to other motives of the *French* king.* All the Templars were gentlemen of the best quality; and the order of Hospitallers was erected a long time before the dissolution of the Templars, contrary to the opinion of *Rastall* in his title of Templars in his statutes, where he says that they commenced at the time when the Templars were dissolved. And *Coke* farther said, that long before the dissolution of

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Britannia,
Middlesex.M. Paris
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* The principal cause of *Philip the Fair's* hatred against the Templars was, that, in his quarrel with *Boniface VIII.* the knights espoused the cause of the pope, and furnished him with money to carry on the war, an offence this which *Philip* could never pardon.

1614. the Templars, there were inns in which the apprentices of the law resided; for it may be seen in an old record among the *communis placita* in the hustings of London, that *John Tracy bene numeratus homo* devised *totum illud hospitium in Holborn in quo apprentitii ad legem habitare solebant*, whence it is manifest that they were resident in Holborn before the dissolution of the Templars. (a.)

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T. 11 Ja. A. D. 1613. B. R.

Kipping v. Swayn. [Cro. Ja. 324.]

Tenant cuts corn, and before carriage his term is expired, yet must he set out his tithes.

1 Brownl.
123. S. C.
2 Bulstr.
119. S. C.

IN debt upon the statute of 2 Ed. 6. for not setting forth tithes, the plaintiff declares, that he was proprietor of the rectory of B. in the county of S. for the term of seven years; and that the defendant was occupier of lands within the same parish for six months, by a demise made 10 Martii, 10 Jacobi: and that the defendant, 27 Augusti anno prædicto, cut his corn there growing; and upon the 10th of September next following, the defendant, being *subditus dicti domini regis*, carried away the said corn, not setting out the tenth, according to the statute. The defendant pleaded *nil debet*, and it was found for the plaintiff; and now moved in arrest of judgement; 1st. That the plaintiff by his own shewing had no cause of action against the defendant, for the defendant's interest in the land was determined before the tithes were carried away: but the court held it to be no exception; for, although his interest in the lands was determined, yet he remained owner of the corn; for if corn be cut down, although a stranger take it away before severance, yet an action on this statute will lie against him. (b)

M. 11 Ja. A. D. 1619. B. R.

Wheeler v. Heydon. [Cro. Ja. 328.]

Declaration upon a lease of tithes for 6 years, if the lessor lives so long and continue parson, and these last words not in the lease itself,

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IN debt upon the statute of 2 Ed. 6. for not setting out tithes, but carrying away the corn, the tithes not being set forth; the plaintiff declares, that one *Thomas Rock*, parson of the rectory of *Scripton*, let unto him the rectory for six years, if he lived so long and continued parson there; and that the defendant, being an occupier of such lands sown with wheat, within the said parish, reaped and carried it * away, the tithes not being set forth, &c. and avers the life of the said *Thomas Rock*, and that he continues parson, &c. The defendant pleaded *non debet*; and a special verdict was given, that the

(a) The *Serjeant's Case*, *infra*, 281. and *Hanson v. Fielding*, Gilb. Equ. Rep. 225. *infra*, 663. leave this point undecided; but in *Whitton v. Weston*, *infra*, 410. and *Fosset v. Franklin*, Sir Tho. Raym. 225. *infra*, 1579. such lands are held to be discharged. See also *Stashome's Case*, Dy. 277. b. pl. 60. *supra*, 132. and *Quarles v. Spurling*, Mo. 913. *supra*, 132. and Cro. Jac. 57. *supra*, 224. by the name of *Cornwallis v. Spurling*.
(b) See *Gwyn v. Meryweather*, 2 Rol. Rep. 440. *infra*, 401.

parson made the lease for six years, if he lived so long; and the words, *if he continued parson*, were not within the lease; and they found all other points according to the declaration; and if, &c. And hereupon it being moved and argued at the bar, all the justices (besides *Houghton*, who doubted thereof) held that the variance betwixt the lease in the declaration and the lease found, shall not prejudice; for it is all one in substance, although it varies in words: and the addition in the declaration, *if he so long continue parson*, is no more than what the law speaks, for so the law tacitly implies, and therefore the addition thereof is no variance in substance. It is also good enough for a second reason; for the lease is not the ground of the action, nor is the declaration founded upon the lease, but upon the carrying away of the tithes, and for remedy of his wrong was the action brought; and the allegation of the lease is but an inducement to the action: and the jury finding that he hath a good lease and a good title to ground his action, although it be not in the same manner precisely as he declares, it being found for the plaintiff, he shall have judgement. But, if debt had been brought upon this lease for years, such variance peradventure would have been material, because the lease is the ground of the action: wherefore it was adjudged for the plaintiff. See for the first point 40 *Ed. 3. 3.* 12 *Ed. 3. Variance 77.* and for the second point, *Plowd. 32. & 191. H. 6. 29. 3 H. 6. 25.*

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yet good in
this action
of debt for
tithes.
2 Bulstr.
83.
1 Brownl.
125.
Moore 834.
2 Ro. Abr.
717. pl. 10.
S. C.

M. 11 Ja. A. D. 1613. C. B.

Dr. Grant's Case. [11 Co. 16.]

THE case was, that *Gabriel Grant*, doctor in divinity, parson of the parish of *St. Leonard* in *Foster-lane*, *infra præcinctum Sancti Martini le Grand*, libelled in the spiritual court before *Dr. Master*, official of the dean and chapter of *Westminster*, against *Edward Taylor*, farmer of a great and ancient house, called the *Dean's House*, within the precinct of *St. Martin le Grand*, late parcel of the possessions of the abbot of *Westminster*; and alleged, that every parishioner or inhabitant having or occupying a mansion-house, shops, warehouses, cellars, or stables, within the said parish of *St. Leonard*, within *St. Martin's le Grand*, yearly every quarter of the year, at the feasts of *Easter*, the nativity of *St. John the Baptist*, *St. Michael* the Archangel, and the birth of *Christ*, *a tempore cujus, &c.* or at least from the foundation, donation, and erection, of the said rectory of *St. Leonard*, by equal portions to the parsons of the said rectory for the time being, *nomine et loco decimar' suar', juxta ratam cujuslibet viginti solidat' redditus per an. ex qualibet hujusmodi domo, shopa, sollar', cellar', sive stabulo sic tent' sive occupat' in prædicta paroshia, duos solidos legalis monetæ Angliæ, &c.* and that the said *Edward*

A custom
that the pa-
rishioners of
St. Leonard
Foster-lane,
within the
precinct of
St. Martin
le Grand,
shall pay to
the parson
2s. in the
pound of
the rent of
their houses
by way of
tithes, is
good.

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 Case.

Taylor and his family did dwell in the said house three years, and had and possessed it for the same time *sub annuali redditu sexdecim librarum seu saltem 12 librarum, &c.* and so demanded two shillings in the pound, &c. The said *Edward Taylor* exhibited an information and suggestion to the court, that the late abbot of *Westminster*, and all his predecessors, till the dissolution of the said monastery which was *anno 30 H. 8.* had held the said house discharged of tithes, and alleged the statute of *31 H. 8.* concerning the discharge of payment of tithes, and conveyed to himself a lease for years, and thereupon had a prohibition; to which the said doctor *Grant* appeared, and *Taylor* declared against him to the effect aforesaid, and doctor *Grant* traversed the said prescription of discharge of tithes; whereupon issue was joined, and tried before me in *London* for doctor *Grant*: and now it was moved by *Taylor's* counsel, that upon the said libel, no consultation ought to be granted; for *de communi jure*, no tithes ought to be paid for houses of habitation, nor for any rent reserved upon any lease made of them; for tithes ought to be paid of things which grow and renew from year to year by the the act of God, *vide Registr' 54 b. F. N. B. 53. E. Br. tit. Dismes 16.* and not for dwelling-houses, or of rents issuing out of land, reserved and created only and merely by the act of the party: and therefore in the city of *London*, the parsons have two shillings and eight-pence in the pound, &c. in name of tithes; but that is by decree made *anno 1535*, which is enacted and confirmed by authority of parliament, *an. 37 H. 8. c. 12.* But *St. Martin's le Grand* is not included within the said decree and act, for it is within *London*, and not of it; and therefore remains at the common law. And in *30 E. 3. fol. 1. a.* and *38 E. 3. fol. 13. a.* by *Finchden* it is said, that the profits of the church in *London* are the oblations and obventions.

But it was resolved *per totam curiam*, that a consultation should be granted, for it may have a lawful beginning; for it may be, that for all the tithes of the land, upon which the houses are built,
 [261] this *modus decimandi* has been *a tempore cujus, &c.* paid; and although it is after built, that shall not take away the right of the parson in such case. And because it might have a lawful beginning, and that it has been used *a tempore cujus, &c.* it was therefore resolved, that a consultation should be granted.

It was likewise resolved, that for these moduses he might sue in the ecclesiastical court, because they are in the nature of tithes, *viz. modi decimandi*; and every ancient city and borough has for the most part such custom *de modo decimandi* for their houses, for the maintenance of their parson. And as to the opinions in *30 E. 3.* and *38 E. 3.* it was said, that *obventio dicitur ab obveniando*,

and includes oblations, rents, or other revenues, which may well agree with the resolution before; and afterwards consultation was granted.

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Dr. Grant's Case.

T. 12 Ja. A.D. 1614. B. R.

Whitaker and Tiddersdale v. Doctor Leyfield [MSS. Calthorpe.]

Dr. *Leyfield* being the parson of *St. Clement's* parish and surrogate of *Middlesex*, libelled before himself for the tithes of certain stables within his parish; and stated that by prescription he and his predecessors time whereof, &c. had used to have 2s. in every 20s. rent paid for the houses, and cited the defendants to answer upon their oath what rent they paid.

Qu. Whether a prescription to have so much for every 20s. rent for houses in the neighbourhood of London be good.

Montague serjt. moved for a prohibition, 1st, because the doctor libelled before himself, so that he is both party and judge, which is unreasonable: 2dly, because the defendants are to answer upon oath what tithes they pay, which is against the law, for *nemo tenetur prodere seipsum*: 3dly, because the doctor demands tithes of houses, whereas no tithes are payable by law for houses except in *London*, under the statutes of 27 H. 8. c. 21. and 37 H. 8. c. 12. and these stables are in *Middlesex*, out of *London*, and so out of the statutes and decree.

The court inclined to grant a prohibition; for as to the first cause, it is a rule in law *nemo debet esse judex in propria causa*; and they said, that if the ecclesiastical judge sit as judge where by law he ought not, the sentence he pronounces is void, and the judgement may be arrested. As to the second, they said, that the statute of 2 & 3 E. 6. c. 13. gives power to the ordinary of the diocese, where the party liable to pay the tithes inhabits, to call the party before him, and at his discretion to examine him by all lawful and reasonable means, other than by his own corporal oath, concerning the true payment of personal tithes; and the statute of 35 H. 8. c. 19. goes also in confirmation of this. But it seemed to *Coke* chief justice, that the motion for a prohibition ought to be made before the oath is taken; for if the oath is once taken, it is too late, because it is then done and past. As to the third cause, *Coke* chief justice, seemed to incline that no prohibition ought to be granted: for the prescription appeared to him to be reasonable enough; because it was probable that where these stables now stand, there was formerly garden or orchard ground, for which a tithe-rent was paid; and it would be unreasonable that the parson should be defeated of his tithes by the building of houses upon such ground: and therefore in *Dr. Grant's* case it was adjudged, where *Dr. Grant* libelled in the spiritual court for the tithe-rent of houses in *St. Martin's* out of *London*, (*viz.*) 2s. in every 20s. rent that was paid; and a prohibition was granted upon a suggestion that all the houses

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were in the hands of the prior of *Westminster* discharged of the payment of tithes at the time of the dissolution by prescription; that a consultation should be awarded upon the prescription found for the plaintiff (notwithstanding it was moved that a consultation ought not to be granted, because no tithe is payable for houses that are out of *London*); for *non constat curiæ* when these houses were built, and it might be that this *modus decimandi* was paid for the land before the houses were built, which *modus* is suable for in the spiritual court, and it is unreasonable that the *modus* should be discharged by the building of the houses. And as to the book of 38 E. 3. which saith, that no tithes are to be paid in *London*, except only offerings and obventions; he said, that this does not extend so far as that a tithe-rent may not be well paid in *London*, because *obventus* includes every manner of profit: and day being given till the next term for the granting of the prohibition, the plaintiffs in the mean time moved the court of common pleas for a prohibition, when it was granted to them.

[*The history of this case in the common pleas is thus given by my lord Hobart, pag. 10. of his Reports.*]

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Doctor Leiffield v. Tysdale.

DR. *Leiffield*, parson of *St. Clements* without Temple-bar, sued one *Tysdale* his parishioner for tithes of certain stables, and libelled that of common right and by prescription time out of mind, the parsons there used to have a *modus decimandi* for the houses, stables, and buildings, that is to say, after the rate of the tenth part of the yearly rent or value of the same. And so he proceeds to demand accordingly, whereupon a prohibition was desired, and the opinion of the court was, that a prohibition was to be granted; for *de communi jure*, no tithes are to be paid for the yearly rent, or value of houses; for tithes are paid for the revenue and increase of things; and therefore no tithes are paid in any such case in any cities or towns in *England*, saving in *London*, and this parish is out of *London* and the liberties thereof. Now, where there is no tithe at all *de communi jure*, there can never be a *modus decimandi*, for that is with an abatement, correction, or alteration of the tithe *in specie*. And yet it seems that this kind of payment had been long used here about *London*, which certainly was by use; for when the statute gave it in *London*, the parts adjoining gained the same by that colour, and even in *London* it must be sued for according to the form prescribed by the statute. But for houses oblations were paid in all places, and now by the statute were brought to a certainty, that is, a groat for a house.

And in *Mich. 12 Ja.* the case was moved again by *Harris* for the doctor, who said that by a special custom such a form of tithing

would stand in any place, and said that Dr. *Grant* had a consultation in this court upon argument in the very same case for 2s. in the pound in *St. Martin's le Grand*, which was not within the statute; for it is a liberty exempted from *London*, and is no part of *London* nor of the liberties of *London*: and the reason was, because it may be supposed that such form of tithing was used for the land itself before it was built upon, and then the building cannot take it away: and therefore it is now directed by the court that they shall declare upon the prohibition, and then proceed to judgement. (a)

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Tr. 12 Ja. A.D. 1614. B. R.

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Prowse v. Dr. Leyfield. [MSS. Calthorpe.]

THE proprietor of the rectory of *Old Clyve*, a parsonage impropriate, libelled against *Prowse* for the tithes of three acres of arable land and three acres of pasture. *Prowse* upon the suggestion which he made, obtained a prohibition, and declared that *William* abbot of *Clyve* was seised of the rectory of *Old Clyve*, and of the lands whereof the tithes are demanded, *simul et semel* from the time of the foundation of the abbey to the time of its dissolution; and that he being so seised made a lease of the lands and of the tithes of corn and of the small tithes in the 9 H. 8. for three lives, rendering 3*l.* for the lands, 26*s.* 8*d.* for the tithes of corn, and 6*s.* 8*d.* for the small tithes; that afterwards the statute of 27 H. 8. *Rastall, Monasteries* 9. was made, whereby all monasteries not above the value of 200*l.* *per annum* were given to the king, by virtue whereof the reversion of these lands, the monastery being under the value of 200*l.* *per annum*, came to the king; and shewed that the lease continued till 20th of *Elizabeth* without the payment of any tithes: and then conveyed the rectory to the defendant, and the lands to himself (the plaintiff in the prohibition), and pleaded the statute of 27 H. 8. c. 20. whereby it is enacted, that the king and his assignees shall hold in as ample and large manner as the abbot held the land, and likewise pleaded the branch of the statute of 31 H. 8. c. 13. which discharges from the payment of tithes; and further stated, that he was ready to pay the rent that was paid to the abbot, &c. and concluded that the defendant *contra modum decimandi prædictum et contra formam statutorum prædictorum* demands tithes, &c. To this declaration the defendant demurred, and prayed a consultation.

Where a discharge is claimed from unity of possession, it must be stated that the religious house was founded before time of memory.

Wincoll of the *Middle Temple* argued, that the count is insufficient: 1st, in regard that the plaintiff entitles himself to be dis-

(a) *Pocock v. Titmarsh*, Bun. 102. *infra*, 630. *Kynaston v. Willoughby*, *infra*, 891. n. *Unfreville v. Kynaston*, *infra*, 890. *Wood*, 9. *infra*, 890. *v. Topping*, *infra*, 893. n.

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charged of tithes by reason of a unity of possession; and it does not appear that there has been a perpetual unity time whereof, &c. for he saith, that there has been a unity from the time of the foundation of the abbey till the time of the dissolution, which is not sufficient without shewing that the foundation has been time whereof, &c. It might be, notwithstanding this plea, that the foundation was 10, 20, or 30 years before the dissolution, which would not be sufficient; for if the time of the commencement of the foundation appeared, that would destroy the custom, according to the case of *Hunkins v. Hunkins*, where an immemorial unity of possession in an abbot of the rectory and lands whereof the tithes were demanded *simul et semel* being alleged, it was shewn by the defendant in prohibition that the foundation of the abbey was within 200 years; and thereupon it was ruled, that it was not a sufficient unity to discharge from payment of tithes: for the unity ought to be time whereof, &c. and where the commencement of a thing appears, it is not time whereof the memory of man runneth not to the contrary; for where any beginning appears either by record or other writing, it is not time whereof, &c. any more than if the beginning had appeared within the memory of man. And for that reason in 3 H. 6. 31. where one prescribed to have a road over land, and there was a unity of possession shewn of the land from which, &c. and of the land over which, &c. in the time of *Richard 2.* it was ruled, that the prescription was destroyed, inasmuch as there was a time shewn, when the road did not exist. 34 H. 6. 36. 19 H. 6. 75. 33 H. 6. 27. 34. 27 H. 6. *Prescription* 48., it is holden, that if a parson prescribes to have an annuity as appurtenant to his church, and the defendant shews either a deed by which the annuity was granted, or the time of the foundation of the church, the prescription is destroyed, because its beginning appears. 43 E. 3. 4. the defendant in an action of trespass made title to the plaintiff as a villein regardant of his manor time whereof, &c. to which the plaintiff replied, that his ancestor in the time of the defendant's great-grandfather, was an *adventif*; and it was ruled, that the prescription failed, because there was a time shewn when the plaintiff's ancestor was not a villein. And the New Book of Entries, 457. 2 Co. 47. the archbishop of *Canterbury's* case, P. 40 *Eliz. Rot.* 437. *Tr.* 34 *Eliz. Rot.* 83. and the case of *Ryder* and *Calmady*, accordingly, that a unity that will discharge one of the payment of tithes within the branch of the statute of 31 H. 8. ought to be a perpetual unity time whereof, &c. and if there be an allegation that it was time whereof, &c. where it is not so, it is a thing traversable, and an issue may be joined upon it. But it seemed to him that the general allegation that the land is discharged from the payment of tithes without

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shewing how it is discharged, is sufficient, according to 2 Co. 47, 48. inasmuch as it may be discharged many ways, as by composition, by prescription, &c. and it would be hard to drive him to shew how it is discharged, when there are so many ways which cannot be well known; but, if he takes upon him to shew the special way how it is discharged, then it ought to be shewn exactly, otherwise the plea is insufficient, and a consultation shall be granted. And lands may be discharged from the payment of tithes without the aid of the branch of the statute of 31 H. 8. as where they are discharged by prescription under a spiritual person, as in the archbishop of *Canterbury's* case, or by composition, as, where there is a *modus decimandi* paid for the tithes in kind.

Coke, chief justice, *Croke*, *Dodderidge*, and *Houghton*, justices, thought that the count was insufficient, because it did not shew the foundation to be time whereof, &c. and the unity which will discharge one from the payment of tithes ought to be a perpetual unity, and not a temporary union.

2dly, *Wincoll* moved that the count was insufficient, because the plaintiff claimed to be discharged from the payment of tithes by the statute of 27 H. 8. c. 20. and the statute of 31 H. 8. c. 13. and neither of those statutes would discharge him. For the statute of 27 H. 8. will not discharge him, because it has not any words of discharge; for it only says, that the *king's patentees shall have all such actions, suits, entries, and remedies, to all intents and purposes, as the abbots might or ought to have had, &c.*, which words will not make any discharge according to the resolution in *Green v. Balser's* case, where it was ruled that if the branch of the statute of 31 H. 8. had been only in general words, that *the king and his assignees shall have the lands in as ample and large manner as the abbies had them*, they would not operate any discharge, because such general words would never extend to a privilege of discharge. And the statute of 31 H. 8. c. 13. cannot discharge these lands, for that statute not being a statute by which monasteries were dissolved, but being only a statute by which monasteries dissolved by surrender, &c. since the 4th day of *February* in the 27th year of H. 8. were confirmed and settled in the king, his heirs and successors, it does not extend to discharge any lands from the payment of tithes, but those lands only which came to the king since the statute of 27 H. 8.; for, after reciting that the monasteries which have come to the king since the 4th day of *February*, it saith, that *the said late monasteries and the lands appertaining to the said monasteries, &c. shall be retained and kept according to their estate and title discharged of the payment of tithes*: wherefore as the abbey in the case at bar, and the lands appertaining to it, came to the king by the statute of 27 H. 8. they can-

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1614. not be comprised within the statute of 31 H. 8. which extends
 * only to lands which came to the king since the statute of 27 H. 8.

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So, for the like reason, lands which have come to the king since the statute of 31 H. 8. shall not be discharged from the payment of tithes, as we may see in 2 Co. 47. the archbishop of *Canterbury's* case, where it is ruled, that lands which came to the king by 1 E. 6. c. 14. shall not be discharged of tithes within the 31 H. 8. And 1 Ja. Rot. 45. and Hill. 44. *Elix. Rot. 444. Quarles and Spurling's* case, where it was ruled, that lands parcel of the priory of St. John of Jerusalem, which came to the king by the statute of 32 H. 8. c. 24. shall not be discharged from the payment of tithes within the 31 H. 8. which extends only to those monasteries which came by inferior means than an act of parliament subsequent to the statute of 31 H. 8. For the same reason those lands which came to the king before the statute of 31 H. 8. shall not be discharged; the statute of 27 H. 8. being as high means as the statute of 31 H. 8. and not inferior to it.

3dly, He argued that the conclusion of the count was insufficient, which saith, and so *contra modum decimandi*, &c. the plaintiff ought not to pay tithes; whereas a *modus decimandi* will not discharge one from the payment of tithes, unless it has been time whereof, &c.

4thly, It appearing to the judges, that the tithes were leased for a rent, they granted a consultation; for now it is manifest that tithes were paid at the time of the dissolution; and if tithes were paid by the farmers of the land, then is the land not discharged from the payment of tithes within the branch of the statute of 31 H. 8. c. 13. and this payment of rent for the tithes was a payment upon the matter of tithes, and a seisin of them.

Note, It appears by the record that there was a demurrer upon the suggestion; but it does not appear that a consultation was granted. (a)

M. 12Ja. A.D. 1614. B.R.

Hickes v. Froud. [MSS. Calthorpe.]

Where
 there was a
 waste be-
 tween two
 villis, N.S.
 and S.S.
 and the re-
 sidents and
 occupants
 of each vill

THE parson of *North Somerset* libelled against *Hickes* for the tithes of the agistment of cattle. *Hickes*, upon a suggestion that there is a great waste between the villis of *South Somerset* and *North Somerset*, and that the residents and occupants of each vill have had common by reason of vicinage, and that there is a custom that if any inhabitant of the vill of *South Somerset* have any pasture ground in the vill of *North Somerset*, for the of those cattle which

(a) *Gibson v. Holcroft*, Yelv. 31. *supra*, p. 222. v. *Drake*, Hob. 295. *infra*, p. 390. *Clavill v. Oram*, Fiddle v. Napier, 11 Co. 8. 6. *supra*, 236. *Stade* *infra*, p. 1364.

go on the waste, that then he shall pay tithes to the parson of *South Somerset* where he inhabits; and that in consideration thereof the parson of *South Somerset* shall pay to the parson of *North Somerset* 4s. and to the vicar 8s. and so the party who inhabits within his parish shall be discharged of tithes against the parson of *North Somerset*, had a prohibition granted to him, and issue being joined upon the custom, it was found for the plaintiff. It was moved in arrest of judgement by serjeant *Bawtry* of *Lincoln's Inn*, that the custom was not good, because it was not equal. For it is not reasonable that the parson of *South Somerset* should have all the tithes of the lands of *North Somerset*, paying to the parson 4s. *per annum*, and that the parson of *North Somerset* should not have the same privileges in the lands in *South Somerset*. And by law no parson is to have tithes but of lands in his own parish. *Sed non allocatur*, for though the custom is hard, yet it is found by the verdict, and therefore we cannot interfere; and here is a recompence, such as it is, given to the parson of *North Somerset*; and though it be not given by the parties themselves, yet it is given by the parson, which is all one, according to the case of *Heron v. Pigot (a)*, in which it was adjudged, that a custom to pay the tithes to the lord of the manor, who used to pay an annual rent for the maintenance of the parson, was good.

The case was afterwards moved again by serjeant *Bawtry*, who said that a *modus decimandi* being the consideration in respect of which tithes due in kind are not to be paid as they ought of right to be, should be precisely alleged, so that it may appear to the court that the parson has a recompence in satisfaction of his tithes; that it is not so alleged in the present case; for the party who claims to be discharged of tithes does not pay any *modus decimandi* to the parson of *North Somerset*; but it is alleged, that the parson of *South Somerset* pays to the parson of *North Somerset* 4s. in discharge, which is not sufficient. For where a parson would be discharged by a *modus decimandi*, he ought to pay the *modus* himself according to the rule, *qui sentit commodum, sentire debet et onus*; and therefore as in this case he does not pay it himself, but another pays it for him, it will not be sufficient to discharge him from the payment. *Sed non allocatur*, for by *Coke* chief justice, *Croke* and *Dodderidge* justices, the custom is good enough to discharge the occupier of lands in *North Somerset* from the payment of tithes to the parson of *North Somerset*, though he pays nothing himself for them to the parson; for he pays his tithes in specie of these lands to the parson of *South Somerset*, who pays 4s. to the parson, and 8s. to the vicar of *North Somerset*; and so the parson of *North Somerset* has a consideration, and the occupier has a discharge, though it be not between the parties themselves, according to the case of

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had common by reason of vicinage, a custom that any inhabitant of *S. S.* having pasture ground in *N. S.* for cattle, which go on the waste, shall pay tithes to the parson of *S. S.* where he inhabits, and that in consideration thereof the parson of *S. S.* shall pay to the parson of *N. S.* 4s. and to the vicar 8s. and that the party so inhabiting within his parish shall be discharged of tithes, found to be a good custom.

(a) *Supra*
200.

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Pigot v. Heron, where it was ruled, that a custom to pay tithes to the lord of a manor, who for himself and his free tenants paid an annuity to the parson in discharge of them, was good, for there the free-tenant is charged with the tithes to the lord of the manor, and therefore it is not reasonable that he should be charged with the tithes to the parson also, when he receives an annual pension from the lord to whom the payment of the tithes is made in consideration of the tithes. And in this special case a layman may have a portion of tithes, and sue for the subtraction of them. And by *Coke* chief justice, and *Dodderidge*, the custom in the case at bar will not aid any one, but only such person as both depastures his cattle in the waste, and also lands in *North Somerset*, for if he lands in *North Somerset* only, or, if he depastures cattle in the waste only, then the custom will not extend to him, because it is, that no tithes shall be paid to the parson of *North Somerset*, where the parson is an inhabitant of *South Somerset*, and depastures cattle in the wastes, and also lands in *North Somerset*.

It was then moved by *Houghton J.* that no prohibition ought to have been granted in the case at bar, because the right to the tithes is to be discussed between two parsons, viz. the parson of *North Somerset*, and the parson of *South Somerset*; and it has been often adjudged, that if a parson libel against one of his parishioners for tithes, upon a suggestion that the parishioner ought to pay the tithes or a *modus* to the vicar, a prohibition shall not be granted; because the right comes to be discussed between two ecclesiastical persons. *Quod fuit concessum* by *Coke* chief justice, who said, that it appears by the book of 22 *E. 4.* that if in an action of trespass the right to tithes comes in question, this court shall be ousted of jurisdiction. And in the case of one *Bush* who was parson of *Pan-cras*, and of lady *Gresham*, who had the parsonage impropriate of

it was ruled, that if the parson libel in the spiritual court against one for tithes, who pleads that he pays 10s. in consideration of all manner of tithes to the vicar of the same parish; no prohibition in such case is to be granted; because the *modus decimandi* does not come in question; but the only point is, to whom the tithes of right belong, and that is triable in the spiritual court. But still he said there was a great difference between that case and the case at bar; for in the case at bar the tithes are payable against common right; because to pay the tithes to the parson of another parish than that in which the lands lie, is against common right, and by intendment it ought to begin by some grant made by the parson, patron, and ordinary of *North Somerset* to the parson of *South Somerset*, or otherwise by some grant made by the parishioners before the council of *Lateran*, and therefore a prohibition might well be granted upon the suggestion of such a custom. But, where

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the parson and vicar are both in the same vill and parish, there, the tithes are paid of common right, and no prohibition ought to be granted. And in the case of *Pigot v. Heron*, where the question was between the parson and the lord of the manor, to which of them the tithes of right belonged, a prohibition was granted; for that the payment of tithes to the lord of the manor is against common right. And *Coke* took it to be a rule, that wherever a spiritual thing begins by temporal means, there, if there be a suit for it in the spiritual court, a prohibition may be well granted; and therefore if tithes are granted by deed to the parson of another parish than that in which the lands lie, and a suit be instituted for them in the spiritual court, a prohibition may be granted according to the Register Judicial, 84. (a) where may be found a supersedeas upon such a grant made by the prior of *Lewes*. And if an obligation or other specialty be made for marriage money, a prohibition shall be granted if there be a suit for it in the spiritual court; for the specialty alters the nature of it. (b)

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M. 12 Ja. A. D. 1614. B. R.

Russell v. Patridge. [MSS. Calthorpe.]

RUSSELL libelled in the spiritual court against *Patridge*, for the tithes of *silva cædua*. *Patridge* suggested that the place where the underwood of which the tithes are demanded is situated, is in the *Weald of Kent*, which contains 14 parishes, and that it was formerly all woody ground, and is now converted into arable and pasture land; and that there hath been a custom there time whereof, &c. that no one shall pay any tithe of wood; and upon this suggestion he prayed a prohibition. And *Hendon* argued that a prohibition might well be granted; for it seemed to him, that as an entire country may prescribe in *non decimando* for any particular thing; so may a particular place prescribe in *non decimando*; and that an entire country may so prescribe appears from the last chapter of the *Doctor and Student*. In the next place the very statute of 2 & 3 E. 6. c. 13. discharges the *Weald of Kent* from the payment of tithes of wood: for the statute saith, that all predial tithes shall be paid in such manner and form as they have been of right yielded and paid within forty years next before the making of that act; and there were no tithes paid at all of wood, as appears by the alleged custom; therefore it shall be now discharged from the payment of tithes. 3dly, The parson has now a greater benefit than he hath had in time past; for at this day the *Weald of Kent* is converted into arable and pasture land, so that now the parson

2 Bulstr.
285. S. C.
by the name
of *Russell*
v. *Back-*
hurst.
Qu. Whether the
Weald of
Kent be
exempted
from pay-
ing tithe of
underwood.

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(a) *Registrum Brevium*.

(b) See *Pigot v. Heron*, Moore, 483. *supra*, 200. *Ord v. Clark*, 3 Anstr. 638. *infra*, 1497.

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hath the tithe of corn and hay, which he never had before; and therefore it is reasonable that as there were no tithes paid of wood when there was a very trifling advantage to the parson, there should be none paid now of it when he has a great advantage. And in the common pleas, between *Downton v. Sir Moyle Finch*, in an action of debt upon the statute of 2 & 3 E. 6. it was holden, that no tithes ought to be paid of wood, and that the custom *de non decimando* was good.

But *Coke* chief justice, and *Dodderidge*, seemed to incline to think that a prohibition ought not to be granted, unless some ancient instrument in writing or matter of record could be produced, which should shew the foundation of the prescription *in non decimando*: for it seemed to them that the prescription by a country *in non decimando* was in respect of some composition. And *Coke* said that both the *Doctor and Student* (a) and *Lindwood* (b) agreed, that a whole country may prescribe in a *non decimando* where there is a sufficient maintenance for the parson over and above the tithes. But this does not appear to be a whole country, nor do its contents appear to us, so that it may be greater or less for aught that we know; but there is only a suggestion made to which we are not bound to give credit. And as to the clause of the 2 & 3 E. 6., which was urged, they said, that, in the first place, the clause goes beyond what has been recited; for it not only says that tithes shall be paid in such manner as they have been paid for the space of forty years before; but it says also, “or of right or custom ought to be paid:” and tithes of underwood of right ought to be paid. It is possible too that there was not in this part any other wood but only great timber, which was never to pay tithe; and it would be hard that now, when there is underwood, no tithes should be paid of that, because there were not any tithes paid for it for forty years before the making of the statute. And if the statute be properly observed, it will afford a strong argument that tithes ought to be paid, notwithstanding they were not paid by the space of forty years: for it has a clause which enacts that no tithes shall be paid of barren or heath ground for the space of seven years after its manurance; the inference from which is, that if this clause had not been introduced, the tithes of it must have been paid immediately after the manurance; and yet of such lands, so being barren, no tithes could have been paid by the space of forty years next before the making of the act. And here *Coke* said, that *Kent* was conquered by *William* the Conqueror, though it might be that the conquest was made by a composition, and not by a conquest in battle. And he also said, that it was a great misery to the commonwealth to have the wood so consumed, as it is by the iron forges and glass-houses; since our ships are the walls of our realm.

(a) Di. 2. ch. 55.

(b) *Lyndewoode's Provincial*, lib. 3.

M. 12 Ja. A.D. 1614. B. R.

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Cotes and Suckerman v. Warner. [MSS. Calthorpe.]

*Cotes and
Suckerman
v.
Warner.*

1 Ro. Rep.
52. 252.
2 Bulstr.
248. S.C.

SIR *Henry Warner* libelled in the spiritual court against *Cotes* and *Suckerman* for the tithes of hay growing within the parish of *Milnall*. *Cotes* and *Suckerman* upon a suggestion, that the abbot of *St. Edmundsbury* in *Suffolk* was seised of the manor of *Milnall* in his demesne as of fee in right of his abbey, (of which manor the closes where the hay was made were parcel), and that he and his predecessors time whereof, &c. had those closes exonerated and discharged from the payment of tithes for himself, his tenants, farmers and occupiers, and that they so continued until the time of the dissolution, at which time the abbey and all the lands thereto belonging were given to king *H. 8.*, and from him they descended to king *E. 6.*, and from king *E. 6.* to queen *Mary*, and from queen *Mary* to queen *Elizabeth*, and from queen *Elizabeth* to the now king, who granted the manor of *Milnall* by his letters patent to sir *Henry Warner*, &c. and that they (the plaintiffs) were occupiers of the said closes, and therefore ought to be discharged from the payment of tithes by the statutes of 31 *H. 8. c. 13.* and 2 *E. 6. c. 13.* obtained a prohibition. To which the defendant pleaded, that the abbot was seised of the manor of *Milnall*, &c. and that the closes of which the hay was demanded were parcel, &c. and that the king had granted the manor to him, &c. as in the count alleged: but he farther said, that *Cotes* and *Suckerman* were severally seised of an ancient house and two acres of land; and that they time whereof, &c. have used to have *libertatem falcandi* for fodder for their cattle which were levant and couchant upon the closes as appurtenant to their houses and lands; and that they cut the hay, and he, for the non-payment of the tithes, upon request, libelled against them in court christian; *absque hoc* that they were tenants, farmers, and occupiers of the said closes. To this plea *Cotes* and *Suckerman* severally replied, and confessed that they had the houses and lands aforesaid, and further shewed, that they used to put in their cattle into the said closes; and that in 31 *Eliz.* they put in their cattle, and mowed the grass, and carried it away, *per quod* they were the occupiers of the closes. To this replication the defendant demurred. And *George Croke* argued that the replication was insufficient, the *per quod*, which is the conclusion, not being maintainable by the premises; for the statement in the premises, that the plaintiffs had a power of putting in their cattle, and mowing the grass, and carrying away the hay, does not prove them to be occupiers; for that they might well do, and yet not be the occupiers; as, if they enter upon sir *Henry Warner*, and put in their cattle, &c. in that case they do what is alleged in the premises, and yet they are

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not occupiers. The conclusion then not being maintained by the premises, the replication is insufficient; for that which comes in in the *per quod* is not traversable, nor can it make an issue. And of that opinion was *Coke C. J.*, *Dodderidge* and *Houghton* justices. But then *Goldsmith* insisted, that the replication was well enough, for that it met the defendant's plea, and the conclusion of the replication is an affirmative to the defendant's negative alleged in his bar, and therefore it makes a good issue according to the case in 7 *E. 4.*, where in debt brought against executors they pleaded a recovery had against them by *J. S.* beyond which they had no assets; to which the plaintiff replied, that there was not any debt due to *J. S.* and so the recovery was void; and this conclusion was holden to be good enough. *Goldsmith* next insisted, that the plea in bar was insufficient, 1. because the defendant by his own traverse had traversed that which was the title by which he must sue in the spiritual court; for he had taken a traverse *absque hoc* that the plaintiffs were the farmers and occupiers of the aforesaid closes; and if they were not so, then they ought not to pay tithes, and if so, then there was no ground for the suit in the spiritual court: 2dly, because the traverse is repugnant to what the defendant has alleged in his plea; for in the beginning of his plea he has confessed that the plaintiffs have *libertatem falcandi*, (which makes them occupiers within the prescription), and yet he has taken a traverse *absque hoc* that they were occupiers. This being so, the bar is insufficient, and therefore judgement must be given for the plaintiffs, however defective the replication may be. For the court are to judge upon the whole matter together, and judgement must be given against those in whom the first fault in pleading is found, according to the case of *Hart and Smith*, 33 & 34 *Eliz.*, where the plea in bar to the avowry being ill, the court gave judgement for the avowant, notwithstanding the replication was insufficient; and in *Poulter's case*, 4 *Co.* 82, 83., we find that the plaintiff had judgement upon an ill bar, notwithstanding his replication was insufficient; and in 7 *E. 4.* 3. it appears, that the court would not give judgement for the plaintiff where one of the defendants was found guilty, because it was apparent to them upon the whole matter, that the plaintiff had no title to the goods in question, and therefore no cause to have judgement.

George Croke, e contra. He admitted that if the bar were insufficient, judgement ought to be given for the plaintiffs, notwithstanding their replication were insufficient; but he said that the bar was sufficient: for the defendant does not libel against the plaintiffs in prohibition as farmers and occupiers of the closes; but he libels against them as commoners, who have *libertatem falcandi gramen* for the maintenance of their tillage; which being so, the

traverse neither crosses the ground of his suit in the spiritual court, nor is it repugnant to what he has before alleged in his plea: for commoners, who have *libertatem falcandi*, are neither farmers nor occupiers. And to that opinion the court assented; for they said, that those who cut the grass ought to pay the tithes, be they disseisors, commoners, purchasers, or by whatsoever other title they take it; for tithes are to be paid out of the profits renewing and growing upon the land, and it is immaterial whether the persons who take them are farmers, tenants, or occupiers. And *Coke C. J.* and *Houghton J.* seemed to incline that those who had *libertatem falcandi* for the maintenance of their tillage were not within the prescription; for they are neither tenants, nor farmers, nor occupiers; and a prescription which goes to bar the church of the tithes which are due to it, is to be taken strictly. But they seemed to think, that if it had appeared upon the record that they were tenants to the lord of the manor of *Milnall*, then they would have been discharged within the prescription.—It was admitted in this case, that where a libel in the spiritual court is against two several persons for tithes, they may join in a prohibition, because the libel is joint against them, though they be several tenants. — *Coke C. J.* said, that a consultation shall never be granted, notwithstanding the insufficiency of the replication, if it appear to the court upon the whole matter that no tithes ought to be paid.

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Cowper v. Andrews. [Moore, 683.]

OXENDEN Cowper brings a prohibition against *Roger Andrews*, vicar of *Cowfield*, that whereas *Thomas* lord *de la Ware* was heretofore seised in fee of 140 acres of land in *Cowfield*, late parcel of an ancient park called *Ewhurst* park, lately impaled and replenished with deer, and being so seised he and all those whose estate he had in the same 140 acres, and all the farmers and occupiers thereof, have used time out of mind to pay the vicar of *Cowfield* for the time being two shillings a year, and one shoulder of every third deer that within the same park should be killed, in full satisfaction of all tithes renewing upon the same 140 acres, which the vicars have always accepted in discharge of all tithes; and then deduceth down the 140 acres to himself; and then shews, that though he tendered the two shillings by the year in such years, and though in the same there were no deer killed, yet the defendant refused to receive the same two shillings before-mentioned to be tendered, and sues him for tithes in kind for those years.

The defendant by protestation denying the prescription, for plea saith, that the park, long before the time of the subtraction of the

Qu. Whether a modus decimandi for a park, viz. 2s. a year, and a shoulder of every third deer killed in it, be determined by disparking. — The pleadings in this case may be found at length in Winch's Entries, 608.; but this statement of them is taken from Hobart, 39

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prefixed to his report of his own elaborate argument. There is a loose and mutilated report of his lordship's argument, and that of Mr. J. Warburton, in 1 Ro. Rep. 120. and the arguments of the counsel may be found in Godb. 237. * [276]

tithes aforesaid, was disparked, and the deer in the same were utterly destroyed and killed by the occupiers and possessors of the said park, and all the lands lying within the said park were converted into arable land and pasture, and so remain; and because the plaintiff after the disparking of the park would not pay tithes for the cattle and corn, &c. therefore he sued him. Whereupon the plaintiff demurred in law.

And whether a consultation should be granted, the court were divided in opinion; *Nichols* and *Hobart* being against a consultation; **Winch* and *Warburton* for one. *Hobart* C. J. said, that the two shillings is clearly a *modus decimandi* which is certain and annual, and the disparking does not prevent the payment of it: and the shoulders are casual, for if the owner does not kill a deer, or but two in a year, the vicar will not have a shoulder. And *Nichols* said, that where the owner converts tillage into pasture, the parson will lose his tithes of corn; and where the owner disparks his park, the parson will lose the shoulders; but he will have the two shillings, and he shall recover in the spiritual court a recompence in money for the shoulders; but the whole park is bound by the *modus decimandi*, and the vicar shall not have tithes in kind.

It seemed to *Winch* and *Warburton*, that by the disparking the prescription as to the shoulders was determined, and consequently, the whole *modus decimandi*, and then the vicar shall have tithes in kind; and if the park be revived, the prescription and *modus decimandi* will be also revived, as tenure by castle ward, &c. (a)

M. 12 Ja. A. D. 1614.

Moyle v. Ewer. [Cro. Ja. 361.]

If a man buy corn standing of the parson himself, yet shall he pay tithes.

In debt upon the statute 2 *Edw.* 6. the plaintiff demands 165*l.* for that whereas by the statute made 2 *Edw.* 6. it is provided, &c. (reciting the clause in the statute concerning the setting forth of tithes, &c.) And whereas the plaintiff, 30 *Septemb.* 6 *Jac.*, was proprietor of the rectory of *Cavesfield*, and of all tithes within the said parish; and whereas the defendant, 1 *Septemb.* 5 *Jac.*, was possessed for divers years to come of 300 acres of land within the said parish, whereof 130 acres were sown with wheat, 120 acres were sown with barley, 40 acres with peas, and 10 with oats; and whereas all tithes were usually paid in *specie* for those lands for 40 years before the said statute; and whereas the defendant the said 30 *Septemb.* 6 *Jac.* sic inde possessionatus existens, all the grain *ad tunc crescent.* upon the said lands did mow and cut down, and all the grain inde

(a) *Skinner v. Smith*, 1 Wood, 155. *infra*, 526. also *Hardcastle v. Slater*, and *Sir Hugh Smithson* *Norton v. Clarke*, 1 Wood, 538. *infra*, 609. See *and Others v. Hardcastle*, *infra*, 784.

provenient. apud Cavesfield did take and carry away, without setting forth the tithes, and without agreement with the plaintiff then being proprietor of the said rectory : *et dicit in facto*, that the tithe of the corn in the year of 6 *Jac.* so taken and carried away, was then worth 55*l.* and the treble value was 165*l.*, *per quod actio accrevit* to the plaintiff to demand the 165*l.* aforesaid : notwithstanding the defendant had not paid' unto him the said 165*l.* *Et ideo producit sectam.* The defendant *protestando* that it is not of such value, for the plea saith, that the plaintiff himself sowed that corn, being possessed of the said land for divers years yet to come ; and 5 *Junii* 6 *Jac.* sold the corn to the defendant ; wherefore he took it ; and traverseth that he was possessed from the time, &c. And it was thereupon demurred, and adjudged for the plaintiff, that he should recover 165*l.* as he had declared. And now a writ of error was brought, and the errors assigned were, that the declaration was not good : First, because all the matter of the declaration and the offence is by way of recital ; and the offence is not alleged by matter in fact, that he carried away the corn, and that the tithes were not set forth. *Sed non allocatur*, for it is sufficiently alleged as well as if it had been by express charge, and the action is brought for non-payment of the treble value, and the other is but to shew the cause how it became due. Secondly, because the plaintiff misrecites the statute ; for whereas the words of the statute are, that he ought to agree with the parson, vicar, or other owner, proprietor or farmer of the said tithes, &c. the words of the declaration are, *cum rectore, vicario, aut alio proprietario seu firmario*, omitting the word (owner). *Sed non allocatur*, for owner and proprietor are all one and *synonyma*, and of the same sense, and the omission of that word is not material. Thirdly, for that he saith, that he was proprietor, but he doth not shew how, nor any title. *Sed non allocatur*, for it is but a conveyance to the action. Fourthly, because it is not shewn by whom the corn was sown. *Sed non allocatur*, for *non refert* by whom it was sown, the defendant being owner at the time of the reaping : and although the declaration be, that 1 *Septemb.* 5 *Jac.* he was possessed of lands sown with corn, and that 30 *Septemb.* 6 *Jac.* he thereof being so possessed, mowed and cut down, which being a year and month after, cannot be well intended ; yet being possible, the declaration is good enough. Fifthly, for that there is not any time alleged of the caption or asportation. But the court conceived, the declaration being, that he, 30 *Septemb.* 6 *Jac.* *sic inde possessionatus* of the said land, *messuit granum prædictum*, it is to be intended, that he reaped it the same day ; and the declaration being, *ac totum granum inde provenient. cepit et asportavit*, although he doth not say, *ad tunc ibidem*, yet it is coupled with the former time by the word (*ac*) and hath

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Exceptions
to a declaration
upon
2 & 3 E. 6.

1. That the
offence was
alleged
only by
way of
recital.

2. That the
word owner
was omitted.

3. That it
was not
shewn
how proprietor.

4. That it
was not
shewn by
whom the
corn was
sown.

5. That the
time when
the corn
was taken
away, was
not stated ;
all disallowed.

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reference to the former time. And they said, that if any one will buy corn standing of the proprietor of a rectory, if he hath not special words to discharge it, he ought to pay tithes; and the carrying away of such corn without setting out the tithes, is an offence within the statute. Wherefore the judgement was affirmed, that he should recover the treble value, as he had declared.

P. 13 Ja. A.D. 1615. B.R.

Owen v. The Parishioners of All Saints in Northampton.

[MSS. Calthorpe.]

Whether a
church be
impropriate
or not, is to
be tried at
common
law.

A CHURCH being appropriated, and having continued so for the space of sixty years without any presentation at all having been made to it, one *Owen*, pretending that it was a presentative church, and that it was devolved to the king by lapse, obtained a presentation under the king's letters patent, and was admitted to it, instituted, and inducted; and this being the church of *All Saints* in the town of *Northampton*, and belonging to one *Carye*, as committee of the wardship of one *Alice Crompton*, to whom it descended as a church appropriate, *Owen* libelled against the parishioners for the tithes. In answer to which they alleged, that the church is a church appropriate, and that *Catlin* is vicar of it, and that they pay the tithes to the owner of the impropriation. But, notwithstanding this allegation the spiritual court proceeded in the suit under a pretence that the impropriation was determined. And *Croke* serjeant moved for a prohibition, because an impropriation is now become a lay-fee, and therefore it belongs to the common law to try whether it be an impropriation or not. And *Coke* chief justice, *ex assensu Croke, Dodderidge, and Houghton*, justices, was of opinion, that a prohibition should be granted; for whether a church be appropriated or not, is a thing triable at common law: for an appropriation by reason of the interest which the king hath to present by reason of lapse, or of the minority of the heir of his tenant, cannot be made without the king's assent under his letters patent, as may be seen by 5 *E. 3.* & 12 *E. 3.* And where the spiritual law is mixed with the temporal law, there, the temporal law shall always have the jurisdiction, as being the elder sister. Besides it would be a mischievous thing that the spiritual law should try the validity of an appropriation where it has been given to the king by an act of parliament, and by the king to one of his subjects under his letters patent, and so has come by mesne conveyances to several other persons; for that would be to try the inheritances of men, which it does not belong to the spiritual law to do, but only to the common law. Indeed, the trial of a union and consolidation belongs to the spiritual law, because it is made by the ordinary without the assent

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of the patron or king. And *Coke* chief justice said, that a reputative appropriation is given to the king by the statute of 31 H. 8. c. 13., though it may not be an appropriation within the strict rules of law: and for that reason he had known it decreed in chancery upon the opinion of the justices, that where an appropriation was made with the assent of the king, the patron, and the ordinary, it should be given to the king, notwithstanding the patron who assented was only tenant in tail, and so his assent was determined upon his death, and therefore it was an appropriation in reputation merely, and not in fact, at the time of the making of the act. It hath also been lately adjudged in the common pleas, that notwithstanding a vicar was not endowed according to the statutes of 15 R. 2. & 4 H. 4. and therefore the appropriation was void by those statutes, yet such an appropriation being an appropriation in reputation, was given to the king by the above statutes, and could not be avoided for this defect. And *Dodderidge* justice said, that there are few appropriations in *England* which have all the ceremonies required by the law to the making of an appropriation. (a)

This case was afterwards moved again by *Harris* serjeant, who prayed that the prohibition might be dissolved, because it appeared that there had been four presentations made in the time of queen *Elizabeth*, and that the profits consist merely in oblations, for which there was no remedy any where but in the spiritual court. But *Dodderidge*, *Croke*, and *Houghton*, justices, would not dissolve the prohibition, because the patronage was a lay inheritance, and the impropriation was now made a lay-fee, so that it was triable at common law: and the prohibition being founded upon the appropriation, it might be properly tried whether it be an appropriation or not; and it would be the speediest course to try it at the common law. And *Dodderidge* said, that an action of debt on the statute of 2 & 3 E. 6. does not lie for the subtraction of oblations. (b)

Tr. 13 Ja. A.D. 1615. C.B.

Wilson v. The Bishop of Carlisle. [Hob. 107.]

THOMAS Wilson brought a prohibition against *Henry* bishop of *Carlisle*, and laid, that there was within the parish of *Greystock* this custom for tithing wool amongst others, that if any inhabitant *have five fleeces of wool or above, that then such inhabitant, after shearing and binding up the said five fleeces *absque fraude et dolo fideliter solvet rectori post monitionem, &c. apud ostium domus mansionalis*

Custom of tithing without view of the parson is bad.

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(a) See *Hunston v. Cocket*, Cro. Jac. 452, *supra*, 285. *Allen v. Tothill*, *infra*, 436.

(b) See statutes 7 & 8 Will. 3. c. 6. and 53 Geo. 3. c. 127. § 4.

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b. *infra* notes.

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ejusdem inhabitantis infra parochiam præd' decimam partem inde absque aliquibus visu vel tactu novem partium ejusdem lantæ resid' per rectorem, &c. habendum vel scrutandum in plenam, &c. and that the parsons, &c. have so accepted it; and then laid, that the bishop of *Carlisle* pretending himself parson or commendatory, &c. The bishop pleads himself the parson or commendatory of the church by presentation, &c. from the countess of *Arundel*, and yet shews that his faculty and confirmation was so long as he should remain bishop of *Carlisle*, (which may well stand together, that he may be parson absolute, yet qualified by his faculty to hold it but for a time,) and then to this custom demurred in law. And it was this term adjudged for the bishop with one consent; for the substance of the prescription is laid that the very true tenth is and ought to be paid without fraud, which is not prescriptible, for it is common right; then the sole point prescriptible is, that this is without view or touch of the nine parts, which is in effect repugnant to the other; for when you have laid truth in the former part, you lay the way to fraud in the latter; for it is against common reason that any man judge or divide for himself, and then take choice of his own division; against the rule of partition in *Litt. lib. 3. cha. 1.* For the truth of the tenth depends upon the proportion it holds with the nine parts; and therefore for the parishioner, who is in the nature of an adversary to the parson in this case, to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he lists, and the prescription were as reasonable as to say plainly, that he might set out what tithe he list. (a)

4 E. 6. 6. the guardian that tenders a marriage, must present the person to the ward. And it is a weak answer to say, that if it be not a just tenth he may refuse it and sue for his due. For first, he hath no means to be assured whether it be true or not; so his suit may be causeless, sure he may be it will be fruitless: but the law was provided not directly to ingender, but to prevent suits, and therefore provides, that things be done by indifferent means and persons, that there be no just suspicion of indirect dealing.

If a man were judge in his own case and judged amiss, a writ of error would redress it; so if a bishop disturb, or would not admit the clerk, he might be compelled; yet the law provides better, that is, that you have your right, and therefore that your means [201] be such as is likely to produce it, you may challenge the array or the polls; yet, you shall remove the *venire fac.* to another officer, as the coroner, where the sheriff is suspected in law, by a provisional challenge afore to avoid delay, which is a kind of injury.

(a) See *Pemberton v. Beckwith*, Raym. 110. post. 603.

M. 13 Ja. A. D. 1615. C. B.

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The Serjeant's Case. (a) [MSS. Calthorpe.]

The Serjeant's Case.
Whether the lands belonging to the hospital of St. John's of Jerusalem be discharged of the payment of tithes.

THE serjeant's case appeared upon the pleading, as I conceive, to be as follows: *Alexander Nowell*, dean, and the chapter of *Paul's*, being seised of a rectory, make a feoffment in fee by deed in 17 *Eliz.* to *Philpot* and his heirs, to the use and behoof of the queen, her heirs and successors; after which a fine is levied, and then the statute of 18 *Eliz.* is made. *Alexander Nowell* dies; *Dr. Overell* is elected dean; five years pass; the queen grants the rectory to *H. D.* and his heirs; *Dr. Overell* the dean, and the chapter of *Paul's* execute a letter of attorney to make an entry in their names to their use, and an entry is made accordingly; after which they grant a lease of it for three lives to *Bolton*. *H. D.* sows certain land, parcel of the possessions of the prior of *St. John's of Jerusalem* in *England*, with corn, and after the corn is severed carries it away, upon which *Bolton* brings an action of debt upon the statute of 2 & 3 *E.* 6.

It seemed to *Finch* serjeant, that judgement ought to be given for the defendant. And he said, that here was but one case, and but one question, for the case was but one, as it had been found by the special verdict; and the question is but one, namely, whether the action lies or not. Yet this case, though it be but one, concerns both the temporal and ecclesiastical state of the realm; for it concerns the queen, who is the supreme head both of temporal and ecclesiastical persons; it concerns deans and chapters, who are a secular corporation; and it concerns priors, who are regular and religious. It is founded on the four principal standards of the law: for it is founded upon a feoffment which is a conveyance of the law for all possessions; upon a fine, which is the general assurance of the realm; upon a trust and confidence, which has diffused itself into the estates of every one; and upon tithes, which are the flower of spiritual possessions; so that though the general question be but one, yet it divides itself into three general questions; the first of which is founded upon a feoffment; the second is founded upon a fine; and the third is founded upon tithes. And in the discussion of these questions there are five statutes which are to be taken into consideration. The first is the statute of 13 *Eliz. c.* 10.; the 2d is the statute of 18 *Eliz. c.* 11.; the 3d is the statute of 4 *H. 7. c.* 4.; the 4th is the statute of 31 *H. 8. c.* 13.; the 5th is the statute of 32 *H. 8. c.* 24. As to the first question, that subdivides itself into three parts; the first of which is, whether the queen be restrained by the statute of 13 *Eliz. c.* 10. so that she cannot take

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1615. any thing from a dean and chapter, they being persons disabled by that statute from making any alienation of their possessions: the 2d is, whether the feoffment made to *Philpot* be merely void, so that upon the words of the statute of 13 *Eliz. c. 10.* it shall be void to all intents and purposes, void against the dean himself who made it: the 3d is, whether the feoffment be made good by the statute of 18 *Eliz. c. 11.* or not. As to the second general question, it subdivides itself into two parts: the first is, whether the fine and five years suffered to pass by the dean be a perpetual bar to the successors or not: the second is, whether, since the dean's predecessor suffered the five years to pass, he himself and his chapter can enter or not. As to the 3d general question, that also subdivides itself into two parts; the first of which is, whether the possessions of the prior of *St. John's of Jerusalem* shall be said to come to the king by the statute of 31 *H. 8. c. 13.* so that they shall be discharged of tithes by that statute: the second is, admitting that they come to the king by the statute of 32 *H. 8. c. 24.* if they shall now be discharged of tithes by the statute of 31 *H. 8. c. 13.* made before it.

[Note. *All the topicks of argument, except those on the subject of tithes, are omitted.*]

As to the first part of the third question, it seems to me, he said, that the possessions of the prior of *St. John's of Jerusalem* are not vested in the king by the statute of 31 *H. 8.* 1st, In regard that the statute of 31 *H. 8.* does not dissolve any monastery, nor give any thing to the king according to the 1 & 2 *Mar. Dy. 3.*; and therefore these possessions could not be vested in the king by that statute. 2dly, It appears by the special verdict that the land is vested in the king by the 32 *H. 8.* If then it is vested in the king by the 32 *H. 8.* it cannot be said to be vested by the 31 *H. 8.*, for as a child cannot have two fathers and mothers, so land cannot be given to the king by two acts of parliament; for it is of necessity that one of them must give it, and not both. As to the 2d part, it seemed to him, that notwithstanding the possessions of *St. John of Jerusalem*

[283] are vested in the king by the statute of 32 *H. 8. c. 24.*, yet they are not to be discharged of tithes by the general words of that statute, which wills, that *the king shall have all liberties, franchises, privileges, parsonages, tithes, &c. which appertained or belonged to the said religion, &c.* For the privilege of being discharged of tithes being a mere personal privilege, shall never be transferred to another by the general words of an act of parliament; but, upon the dissolution of the corporation, there shall be also a dissolution of the privilege, according to the case of 7 *E. 4. 22.*, where it is holden, that by a determination of the office there shall also be a determination of the fee which belongs to the office, because it is a

thing incident to the office. And 35 H. 6. 56. upon the dissolution of the *Templars*, there was also a dissolution of the appropriations; and the personal privilege to hold in frankalmoigne could not be transferred by the general words of the 17 of E. 2. And it is resolved in the archbishop of *Canterbury's* case in 2 Co. that the general words of 2 & 3 E. 6. do not give any immunity to be discharged of tithes. The same law as to the statute of 37 H. 8. And the very words of the statute of 32 H. 8. shew, that the privilege of being discharged of tithes appertains to the order of religion, and therefore the order being dissolved, the privilege is also dissolved; and though the words of this statute be, *which appertained to the religion*, yet that is to be intended of the order of religion, for otherwise the king could not have any of their lands, but they would revert to the founders, according to 5 H. 7. 37. and 7 E. 4. by *Danby*. But, notwithstanding they are not to be discharged by the general words of the 32 H. 8. yet they shall be discharged of the payment of tithes by the statute of 31 H. 8. c. 13. For in that statute there is a double provision and ordinance made for religious houses, in two distinct branches; the first of which is, that *all religious and ecclesiastical houses, &c. which hereafter shall happen to be dissolved, suppressed, renounced, &c. shall be vested, deemed, and adjudged by authority of this present parliament, in the very actual and real seisin and possession of the king our sovereign lord, &c.* The 2d is, that the king and his patentees, *which have or hereafter shall have any monasteries, &c. shall have, hold, retain, keep, and enjoy, the said monasteries, &c. discharged and acquitted of payment of tithes, as freely, and in as large and ample manner, as the said late abbies, &c. had them.* And here the king had and enjoyed these lands parcel of the possessions of *St. John, &c.* wherefore by the words of the statute they shall be discharged. Besides, the words *dissolved, suppressed, renounced, and relinquished*, being of one nature; and the words, *forfeited, given up, or come*, being of another nature, are to be observed. For where corporations are dissolved, there, if no other provision be made, the founder shall have their lands: but, if the lands are relinquished, there, neither the king nor the founder shall have them, but they remain as in the corporation: but by way of forfeiture or giving up, as in the case at bar, they may well enough come and settle in the king, and the king shall have the benefit according to the provision of the statute. And as to what has been objected, that where lands come to the king by an act of parliament, that shall not be said to be such a coming to the lands as is intended by the statute, in the first place he said, that that might be well enough said to be a coming within the statute; and so was the opinion of *Popham* chief justice. In the next place, the king does not come to them

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by the act of parliament; for an act of parliament cannot be a donor, as may be seen by *Wimbish's case* in *Plowden* (a); and therefore the prior and convent who surrendered them shall be said to be the donors, and it shall be said to be a *giving up* by them, which may well enough be comprised within the statute. And as to the objection which has been made, that a thing shall never be within the branches, which is not in the root, and that because the possessions of the priory of *St. John's of Jerusalem* are given by the act of 32 H. 8. c. 24. and not by the act of 31 H. 8. c. 13. they shall therefore not be capable of being discharged of tithes by a branch of the statute of 31 H. 8.; he said, first, that a thing which is not within the root may well be within a branch; as, where lands devisable holden *in capite* are devised, the king shall have the wardship and primer seisin of a third part by virtue of a saving in the statute of 32 H. 8. notwithstanding the lands being devisable by custom are not contained within the body of the act, as appears from a case in 4 & 5 Mar. Dy. 155. and *Matthew Mene's case*, 9 Rep. 133. & Hil. 1. Eliz. Rot. 573. in the king's bench. In the New Book of Entries, 454., there is a strong case to our purpose; and if the pleading there be good, as it is admitted, it over-rules the case in question; for the pleading is *virtute actus*, 32 H. 8. c. 24. *et vigore actus parliamenti facti*. 31 H. 8. the king was seised; and it shall not be that he was seised by virtue of the statute of 31 H. 8. except in case where he is to be discharged of tithes. And here he cited *Grenvill's case* 31 El., where it was adjudged that a bishop is not within the statute of *West. 2. c. 41.*, for the words of the statute do not extend to him, they being express of certain persons within the compass of which a bishop cannot be; for a bishop is a secular, and not a religious person. And he cited the opinion of *Manwood* to be, that by a grant of a monastery in the case of the king, any religious house, be it an hospital or any other, will pass.

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Chamberlayne serjeant argued for the plaintiff, but I have omitted the report of his argument, because I heard only a part of it; and because the substance of it may be seen in my other book of Reports in the case of *Urry and Bowyer*, (*supra* 250.) (b)

M. 14 Ja. A. D. 1616. B. R.

Anon. [MSS. Calthorpe.]

A PROHIBITION was granted to a suit in the spiritual court for the tithes of a house in *London*; because, by the statute of 37 H. 8.

(a) P. 38.

(b) On this point see *Stathome's case*, Dy. 277. b. pl. 60. *supra*, 132.. *Quarles v. Spurling*, Me. 913. *supra*, 132. S. C. Cro. Jac. 57. *supra*,

224., by the name of *Cornwallis v. Spurling*. *Whitton v. Weston*, *infra*, 410. *Hanson v. Fielding*, Gilb. Equ. Rep. 225. *infra*, 663. *Fosset v. Franklin*, Sir T. Raym. 225. *infra*, 1579.

c. 12. the mayor has jurisdiction given him to make order concerning the payment of tithes in *London*. (a) 1616.

P. 15 Ja. A.D. 1617. B. R.

— v. *Barnes*. [MSS. Calthorpe.]

farmer of the rectory of *Trumpeton* libelled in the spiritual court again *Barnes* for the tithes of five acres of grass: the defendant set forth a custom by which he was to pay the 10th cock in grass, after it is cut down and cocked, and before it is made into hay; to which the plaintiff replied, that if the ground be wet, he is to take the 10th cock in grass before it be made into hay; but if the ground be dry, then he is to have the 10th cock, after it is made into hay: and sentence was given in the spiritual court against the defendant, and he was adjudged to pay 7*d.* because he had paid neither tithe grass nor tithe hay, and 20 marks. A prohibition was moved for, because the issue was joined upon a *modus decimandi*, which was a thing triable at common law. And it was agreed, that where the issue is upon a custom which gives a recompence for the tithes in kind, there a prohibition ought to be granted: but, where the custom alleged gives no recompence, a prohibition ought not to be granted; and therefore in this case the prohibition was refused. (b)

Where the issue in the spiritual court is upon a custom which gives no recompence to the parson for the tithes, a prohibition shall not be granted.

Tr. 15 Ja. A.D. 1617. B. R.

. *Portinger v. Johnson*. [MSS. Calthorpe.]

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PORTINGER sued *Johnson* in the spiritual court for the tithes of grass to be made into full, sufficient and perfect hay. *Johnson* surmised that there was a custom to cut the grass, and then to ted it, and to put it into grass cocks, and that when it is in that state the parson is to take his tithe: and upon this surmise a prohibition was moved for: and the cases of *Aubrey v. Johnson*, in 34 *Eliz.* in *B. R.*, and *Portinger v. Johnson* (c), in 41 *Eliz.*, where upon the like surmise a prohibition was granted, were cited. A day was given to shew cause, and I was of counsel in the case, but the prohibition was denied; for it being confessed, that tithes ought to be paid, and the *modus* giving no manner of recompence to the parson, it is not to be resembled to a *modus* which gives a recompence, for this *modus* may well enough be tried in the spiritual court, and accordingly in the case of farmer of the rectory of *Trumpeton* and *Barnes*, a prohibition was denied for this very reason. And *Johnson* was parson of the church of *Burghfield* in *Berkshire*. (d)

Prohibition denied where a custom was surmised to cut the grass, ted it, and put it into grass cocks, and the tithe to be taken in that state.

Supra 223.
Infra 473,
n.

Supra 285.

(a) See *Meadhouse v. Taylor*, Noy. 130. *infra*, 329. n. *Burgess v. Symons*, Litt. Rep. 102. 141. *infra*, 433.

(b) See *Portinger v. Johnson*, *infra*, 286. *Fletcher v. Wilkinson*, *infra*, 675.

(c) Cro. Eliz. 640. *Johnson v. Aubrey*.

(d) *Fletcher v. Wilkinson*, *infra*, 675.

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Tr. 15 Ja. A. D. 1617. B. R.

Anon.

Anon. [MSS. Calthorpe.]

A mill newly erected upon glebe land is titheable. The extent of an endowment is triable in the spiritual court. Cro. Jac. 429. S. C.

A MILL is erected upon glebe land parcel of a parsonage which came to the king by the statute of dissolutions. The vicar, who is endowed with small tithes, sues the parson for the tithes of the mill. The parson applies for a prohibition, 1st, because the glebe upon which the mill is erected was discharged of the payment of tithes; 2d, because the vicar's endowment does not extend to the tithes of a mill. But the prohibition was denied; for the mill being lately erected, tithes ought to be paid for it, and the extent of the endowment is a matter triable in the spiritual court. The discharge of the glebe cannot extend to a mill erected *de novo*. (a)

Tr. 15 Ja. A. D. 1617.

Hampton v. Wild. [Cro. Jac. 430.]

Tithe is not due for depasturing a saddle horse kept by the occupier of the land for purposes of husbandry.

A PROHIBITION was awarded to the spiritual court, for that *Hampton*, parson of *Humble-Thorpe*, sued *Wild* in the spiritual court, because the said *Wild* had let a certain close, reserving pasturage for his saddle gelding.

The parson had sued him for tithes to be paid of things *renovant*, but this horse being only for labour and travail would not renew; otherwise it would have been if he had kept a horse to sell whereby profit had been accrued, for in that case he should have paid tithe.

Houghton contra, In the principal point, because by the pasture he may increase the profit, and so it is a profit *ratione fundi*, as in case of barren cattle; he ought to allege further, that they were used to labour.

And by all three justices, If he had averred in the surmise that he used the horse for labour, the prohibition had lain.

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Tr. 15 Ja. A. D. 1617. B. R.

Dobitoft v. Curteene. [MSS. Calthorpe.] (b)

If a religious house were seised of a rectory and lands within it *simul et separatim*, and some of the tithes of those lands were in

UPON a special verdict in an action of debt upon the statute of 2 & 3 E. 6. the case appeared to be as follows: *William Fleming*, abbot of *Evesham*, and his predecessors, being seised time whereof, &c. of a parsonage and rectory appropriate, and of a certain grange within it, in the 26 H. 8. makes a lease for 40 years to one *Pigeon* of the grange, and of the tithes of hemp, flax, corn, and hay, growing thereon, rendering rent for the same; and the lessor covenants that the lessee shall not pay the tithes of hemp, flax,

(a) See *supra*, 130. n. *More v. Russell*, *infra*, 355. *Thomas v. Price*, *infra*, 871.

(b) No. 34. Harg. Bibl. Brit. Mus.

corn, or grain, but that he shall pay the tithes of wool and lamb, and further, that he shall pay those tithes to the vicar and his successors; the statute of 31 H. 8. c. 13. is made: the lease expires: the parsonage is granted by the king to one, and the grange is granted to another; and the tithes of corn not being set out, *Dobitoff*, the patentee of the parsonage, brings debt on the statute of 2 & 3 E. 6.

George Croke argued that judgement must be given for the plaintiff; for tithes of lamb and wool being paid at the time of the dissolution, and of the making of the statute of 31 H. 8. and a rent being likewise paid for the tithes of hemp, flax, corn, and grain; the grange cannot be said to be discharged from the payment of tithes at the time of the dissolution, and therefore is not within the compass of the statute of 31 H. 8. c. 13. For though those lands are to be discharged of the payment of tithes which were discharged at the time of the dissolution by reason of a perpetual union, as appears by 2 Rep. 47. the *archbishop of Canterbury's* case; yet if the tithes were paid, or if the tithes of any lands were leased out at the time of the dissolution, tithes ought to be paid for such land, as we learn from the case of *Greville and Trot*, 2 Rep. 48. and the case of the parson of *Peykirke*, 18 Eliz. Dy. 349. where tithes were paid, as in the case at bar, under a lease; and notwithstanding there was a lease made by the abbot himself, yet *de jure* he, being parson, ought to have tithes contrary to his own lease, according to 32 H. 8. and the case of *Perkins v. Hinde, Hill*, 31 Eliz. Rot. 138. where it was resolved, that if the parson of a parsonage impropriate makes a lease of part of his glebe reserving a rent, for all manner of exactions, matters, duties, and demands, yet he shall have tithes notwithstanding this reservation, because tithes are spiritual things, and the general words extend only to temporal things; and though a rent was here reserved for the tithes, and the tithes themselves were not paid, yet it is all one: for the rent is in lieu of the tithes according to the case of 15 E. 3. *Fitzh. Execution* 63. where it is holden, that the rent reserved coming in lieu of the land, the rent may as well be extended as the land.

Bridgeman e contra. He argued, that there not being any tithes of corn and hay paid at the time of the dissolution, no tithes should now be paid of them, because as to those tithes there was a discharge at the time of the dissolution. And this is evident from the above book of 18 El. Dy. 349. where it appears that the lands were discharged from the payment of all other tithes than those which were paid at the time of the dissolution, and from *Greville and Trot's* case, where it is holden that tithes shall not be paid of those lands which were discharged at the time of the dissolution. As to the objection, that the rent in this case comes in lieu of the tithes,

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lease under a reserved rent at the time of the dissolution, they are now chargeable with the payment of tithes, for the payment of rent; for tithes is an equivalent to a payment of the tithes themselves. Cro. Ja. 452. S. C. but not so fully reported.

Supra 189.
Supra 208.
by the name of *Benton v. Trot*
Supra 136.
Supra 161.

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that cannot be; for tithes not being a thing manurable, the rent cannot be said to issue out of them, any more than it can be said to issue out of the toll of a mill, or such other thing not manurable, as appears by 30 *Ass.* 15. 4 *El. Dy.* 212. and 7 *Co.* 23. *Butt's* case. And though the lessee is by law to pay tithes notwithstanding the reservation of rent, or feoffment made of the land, because tithes are distinct things from the land; as is evident from 42 *E.* 3. 13. 30 *H.* 8. and *Dy.* 43. yet it appears in this case by the covenant and by the lease itself that it was not the intention to have such tithes paid: wherefore there being a discharge *de facto* from the payment of tithes at the time of the dissolution of lands which had been discharged time whereof, &c. tithes shall not be paid now of them, according to 30 *E.* 3. 3. 21 *H.* 7. 9. and 31 *E.* 3. *Garraunt de Chartres* 22. where it is holden, that if the grantee of a rent disseise the terre-tenant, and make a feoffment with warranty, the feoffee shall vouch of the land discharged of rent; and yet there was only a discharge *de facto*, and not a discharge *de jure*. And the case of 44 *Ass. pl.* 45. was here cited. He further said, that if the king grant lands, which have been always discharged of tithes, they shall remain discharged.

Croke and *Houghton* justices seemed to think, that judgement ought to be given for the plaintiff. For they conceived, that there being tithes paid of some things at the time of the dissolution, and there being an express lease to the terre-tenant of the tithes of other things, and a rent reserved for them, tithes should be paid now as well as in the case of *Greville and Trot*, 2 *Co.* 48. and 18 *Eliz. Dy.* 349.

The case was moved again in *Mich.* term by *Davenport* on the part of the plaintiff, and *Coventry*, the king's solicitor, on the part of the defendant.

Davenport. — I conceive that as there was a lease of the tithes of corn and hay, and a rent reserved for them at the time of the dissolution in 31 *H.* 8. and as there was also a payment in kind of wool and lamb, there was not such a discharge from the payment of tithes at the time of the making of the statute, as that these lands so in lease should be ever afterwards discharged. For by the lease there is an express contract for the tithes; and where a tithe is paid in kind, or a rent is paid for it, the perpetual union which occasions the discharge does not exist, as appears by *Priddle* and *Napier's* case, 11 *Co.* 13 & 14. For 1st, it is evident, that tithes of themselves are an hereditament of that nature that neither unity of possession will cause a suspension of them, nor will livery cause an extinguishment of them, as we may see by 42 *E.* 3. 13. though a livery will extinguish a rent, according to 35 *H.* 6. 56. wherefore the union does not of itself make a discharge from the payment of tithes, or a suspension of them; but upon a perpetual

Supra 236.

union a constructive discharge is raised, because it would be infinite to drive the patentees to shew in what manner the discharge came, whether by a composition, or by a bull of the pope, &c. but it being apparent in this case that the discharge from the payment of tithes of corn and hay was only in respect of the contract, upon the dissolution of that contract and the determination of the lease tithes must be paid in kind. 2. It appears by *Priddle* and *Napier's* case, that the union which creates a discharge from the payment of tithes must have four qualities, viz. 1. it must be *justa*: 2. it must be *æqualis unio*: 3. it must be *perpetua unio*: 4. it must be *libera*, that is, free from the payment of tithes. But in this case there is no such union: for at the time of making the statute of 31 H. 8. there were tithes paid in kind of wool and lamb, and a rent was paid for the tithes of corn and hay. And it appears by *Trott's* case, 2 Rep. 48. that if the lessee pay tithes at the time of the dissolution, tithes in kind shall be paid afterwards: and though there is only a payment of rent for the corn and hay, and no payment of tithes in kind of those articles; yet the rent coming in lieu is all one with a payment of the tithes themselves. And upon this reason it appears by 31 E. 3. *Fitzh. Assets*, pl. 13. that a rent descending to a son and heir shall be assets, notwithstanding it be extinct upon the descent by reason of unity of possession; and 21 E. 3. 18. *F. N. B.* 223, 224. & 38 *Ass. pl.* 17. a rent extinguished by way of release to an abbot will be mortmain; and 11 H. 7. 12. the tenant upon whom a mesnalty descends, being within age, shall be in ward, and pay a relief for it, notwithstanding that the mesnalty be extinct in law; and in *Carre's* case, 26 *Eliz.* cited in 3 Rep. 30 b. it appears that a rent extinguished will make such a tenure *in capite*, that the king shall have a third part of the lands in wardship: and it appears by 37 H. 6. 26. that the payment of a rent of 6l. by way of retainer is a having and holding within the condition of an obligation; and 28 H. 8. *Dy.* 15. it appears that such a retainer upon a release made to him is a purchase within the intent of a condition; and 13 H. 7. 16. the payment of an amercement for suit of court is a sufficient seisin of suit of court, for it comes in lieu of the suit. As to the objection, that the rent could not be paid in lieu of tithes, because it issues only out of the land, and not out of the tithes, according to 5 E. 3. 68. it may be answered, that though it issue only out of the land by way of remedy, for the grantor cannot distrain in the land; yet it issues out of the tithes by way of recompence, for the rent is a recompence for the tithes, and it is increased in respect of the tithes. And as to the objection, that an action of debt will not lie on the statute of 2 & 3 E. 6. for that the tithes of corn and hay have not been paid by the space of 60 years, and the statute wills, that *every of the king's subjects*

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dial tithes in their proper kind as they rise and happen, in such man-
ner and form as hath been of right yielded and paid within forty years
next before the making of this act, or of right or custom ought to have
been paid; in the first place, inasmuch as the tithes of corn and
hay have been paid by way of retainer, and a rent has been paid
for them within that time, this shall be a payment within the act.
 2. Notwithstanding there was not any payment *de facto*, yet be-
 cause there must have been a payment *de jure*, if it had not been
 in respect of this real contract, this shall be said to be within the
 act. 3. Here is a payment of tithes in kind for part, and so the
 very words of the act are satisfied.

[291] *Sir Tho. Coventry e contra.* — I conceive in the first place, that
 the unity of possession of the rectory and lands in the hands of
 the abbot of *Evesham* caused a suspension of the payment of tithes,
 though it did not make an absolute discharge of them; for in
 30 *H. 8. Dy.* it is said, that if a parson purchase land within his
 own parish, the land by reason of this unity is made *non decima-*
bilis; and if it cause a suspension, then the clause of the statute of
 31 *H. 8. c. 13.* extends to make it a perpetual discharge; for it
 says, that *all and every person and persons shall have, hold, retain,*
keep, and enjoy, &c. according to their estates and tithes, discharged
and acquitted of the payment of tithes, as freely and in as large and
ample manner as the said abbots, priors, abbesses, prioresses, &c. had,
held, occupied, possessed, or enjoyed them, &c. at the days of their dis-
solution. And this statute is to be expounded liberally, because it
 was the intention of parliament to advance the king's sales by the
 grant of these immunities, and to encourage people to purchase the
 lands; and for that reason, in the case of *Hollivell v. Johnson,*
M. 39 & 40 Eliz. in the common pleas, it was adjudged, that where
 an abbot purchased a portion of tithes which another had in his
 lands, notwithstanding this unity did not make a perpetual dis-
 charge from the payment of tithes and an extinguishment of them,
 but, upon severance of the portion from the land, they would be
 again payable as before; yet it made a discharge upon the construc-
 tion of the statute of 31 *H. 8.* so that the lands should be discharged
 from the payment of tithes in the hands of the patentee. And
 in the *New Book of Entries* (a), 453. *Hil. 1. Eliz. Rot. 573.* and 24
Eliz. Rose and Spirling's case, it appears, that upon the suggestion
 of a union a prohibition was granted. And this construction to
 have such discharge upon the union is not prejudicial to any one.
 For 1. the king sustains no loss; for what he loses in the rectory
 by the discharge, he recovers in the land. 2. Every one has be-
 nefit by it, because it settles quiet and repose. 3. This construc-

(a) *Coke's Entries* quoted as above in contradistinction to *Rastall's* and other older books.

tion tends only to the preservation of ancient privileges *in esse* before the making of the statute of 31 *H.* 8.

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2. I conceive, that the cause of the discharge by reason of union is not removed either by the lease, or by the reservation of rent; for as to the lease of the tithes of corn and hay, it would have been clear that if such lease of the rectory had been made to a stranger, the discharge would have continued the lease notwithstanding; for the discharge goes to the freehold as well as to the possession; wherefore the freehold being discharged at the time of the dissolution, it shall be said to be a discharge within this statute. And for this reason it is, that in the *bishop of Winchester's* case it was adjudged, that a copyholder of the bishop should be discharged of the payment of tithes; for the freehold and inheritance were discharged; and therefore the possession shall be likewise discharged. As to the cases of 18 *El. Dy.* 349. & 10 *Eliz. Dy.* 277. and *Trott's* case, cited in 2 *Rep.* 48. the case of 18 *Eliz.* proves directly, that tithes ought not to be paid of any other things than of wool and lamb, and that a prohibition should be granted as to all other tithes. And in the case of 10 *Eliz.* the discharge was personal *quamdiu propriis excoluntur*, upon which it was holden that the farmer should pay tithes: and in *Trott's* case, the lessee of the lands paid tithes of them to the abbot at the time of the dissolution: and in *M.* 40. & 41 *Eliz.* between *Benton* and *Trott* an issue was taken upon the payment of tithes: so that it should seem from this case, that notwithstanding there was a severance of the rectory and of the land, yet, if tithes were not paid for the land at the time of the dissolution, they shall continue discharged after the dissolution: for which reason in the case at bar, notwithstanding there was a severance of the rectory and of the land in the hands of the abbot, yet, inasmuch as for these lands so severed, there were not any tithes of corn and hay paid at the time of the dissolution, there shall not be any tithes paid at this day.

Supra 167.

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Supra 208.

3. The union making a discharge, and no tithes of corn and hay being paid at the time of the dissolution, the reservation of the rent shall not charge the land with the payment of tithes of corn and hay: for the *reddendo* of the rent being generally *proinde*, it cannot extend to make the rent to be for the tithes, because not being things manurable in which a distress could be taken, a rent cannot issue out of them according to 11 *H.* 4. 40. and therefore the *proinde* must have relation to such things out of which a rent can arise. And though in 1 *H.* 4. it is holden, that a rent may be well enough reserved out of a mesnalty, and in 10 *E.* 4. out of a reversion; yet that is in respect of the possibility that the land may be charged: for the tenancy may escheat, and the particular estate may determine: but there is not any such reason in the case at bar.

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4. The payment of tithes by way of retainer cannot be any such payment, because that might be alleged upon all unions whatsoever, and so no union would make a discharge, which is contrary to the statute of 31 H. 8. which operates a discharge in cases where there is a union and no payment of tithes. As to the covenant that the lessee shall not pay any tithes of corn and hay, that cannot mend the matter, and indeed it rather enforces the contrary, viz. that tithes ought not to be paid.

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5. An action of debt does not lie upon the words of the statute for the tithes of corn and hay, because, until the 26 H. 8. no tithes at all were paid, nor were any afterwards paid of corn and hay; so that no tithes being paid by the space of 40 years before, an action of debt cannot now be maintained within the statute. As to the objection, that tithes, notwithstanding the union, *of right ought to be paid*, and therefore it is within the compass of the statute; it appears by 30 H. 8. Dy. 43. that unity of possession of the land and rectory is what makes it *non decimabilis*. And as to the objection, that a rent has been paid for the tithes, which is a sufficient payment within the statute; it appears by the words of the statute which will have the payment of all predial tithes in their proper kind, as they have been paid by the space of 40 years before, that the payment within the 40 years must be a payment in kind, and not a payment of a rent in lieu of the tithes. Besides, if payments beyond 40 years might be raked up, that would be a means of raising much debate, and it would be such a construction too as would make the words "*by the space of 40 years*" void and idle; and it would be hard to subject a man to the penalty of treble damages where no tithes in kind were ever paid by the space of 40 years. And there is a difference, where an abbot, who was parson imparsonnee, made a lease for years of land lying in the same parish as the rectory; and where the king's patentee of an impropriate parsonage at this day makes a lease for years of his lands. For though the lessee in the first case ought to pay tithes, because they were spiritual things belonging to the pastor of his soul, and do not pass included within the land, as we see in 30 H. 8. Dy. 43 & 32 El. *Perkins* and *Hynde's* case, where a lease for years was made of land, reserving rent for all exactions and demands, and it was holden that the lessee should pay tithes; yet in the other case the lessee or alienee of the glebe should not pay tithes, because they stood discharged from the payment of tithes upon the statute of 31 H. 8.

Montague C. J. Croke, Dodderidge, and Houghton J. held that judgement should be given for the plaintiff. For in the first place they resolved, that unity of possession of the lands and rectory is not any extinguishment or suspension of tithes at all, tithes being

a duty merely collateral to the land, and not any way appertaining to it. And they may be resembled to a warren, which is a distinct thing from the land, and therefore not extinguished by a feoffment of the land according to the book of 35 H. 6. as a rent or remainder are. And upon this reason it was adjudged, that if a lease for years be made of land reserving a rent for all exactions and demands, the lessee shall pay tithes of his land, because they are not issuing out of the land, nor appertaining to it, but are a mere collateral duty, due to the pastor in respect of his feeding our souls; and though the union occasions a suspension of the payment of tithes, because a man cannot pay tithes to himself; yet it does not occasion a suspension of the tithes, but they come into *esse* as soon as there is any one who is capable of taking them. 2dly. They resolved, that a unity of possession of the land and rectory in the hands of the abbot at the time of the dissolution in 31 H. 8. if it had the four properties and qualities mentioned in *Priddle and Napier's case*, is a sufficient discharge from the payment of tithes within the statute of 31 H. 8. so that the surmise of such a union would be a good ground for a prohibition, if there were any suit for tithes against it: for when such union has continued time whereof, &c. it shall be intended that there was some composition or bull of the pope which gave a discharge from the payment of tithes, but which the party shall not be driven to produce by reason of the great inconvenience that might ensue from the infiniteness of search for such things; and in order to avoid that inconvenience the allegation of unity time whereof, &c. hath been allowed to make a discharge from the payment of tithes. 3dly. They resolved, that unity of possession of the land and rectory *simul et semel* at the time of the dissolution is not sufficient to discharge lands of the payment of tithes after a severance has been made of the land and rectory, if it appear to the court that there was not any composition or bull of the pope to discharge the land of tithes, but only a unity of possession; for then it appears that there was only a discharge *de facto* from the payment of tithes, because by reason of the union the abbot could not pay tithes to himself, and there was not any discharge *de jure* of the lands from tithes; and it must be, or be intended to be by reason of some composition or papal bull, where the lands shall be discharged by 31 H. 8. 4thly. They resolved, that the lease of the tithes of corn and hay to the lessee in the lease of the lands, and the reservation of rent *proinde*, make an exposition or explanation that the lands were only discharged of the payment of tithes by reason of the unity of possession of the lands and rectory in the hands of the abbot, and not a discharge of tithes by any composition or papal bull, or any other manner by which there should be a discharge *de jure*. For if there had been

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any discharge *de jure* by composition or papal bull, then there would be no occasion for any contract for the tithes of the lands, because the tithes ought to be paid of them in kind : but the discharge being only in respect of the unity of possession, there, without a contract made for the tithes, tithes are to be paid by the lessee ; and here upon the lease by which there is a severance of the land and rectory, the cause is taken away which occasioned the suspension of the payment of tithes. And for this reason it is that it was adjudged in *Trott's case*, that if the lessee of an abbot at the time of the dissolution paid tithes at the time of the dissolution to the abbot, the lands should be afterwards charged with the payment of tithes ; because the payment of tithes to the abbot was a declaration that the lands were only discharged of the payment of tithes by reason of a unity of possession, and were not discharged of them *de jure* ; so that when the unity of possession was afterwards determined by the severance of the lands from the rectory by the king's grant, then tithes should be paid for those lands, and as they were payable before the unity of possession : for the statute of 31 H. 8. extends only to the discharge of payment of tithes *in right*, and not to a discharge of payment of tithes *in fact* without right, agreeably to the exposition of the statute of West. 2. c. 1. which saith, *quod finis ipso jure sit nullus*, which is understood to avoid a fine as to the binding of the possession, not as to the binding of the right. 5thly. They resolved, that the payment of the tithes of wool and lamb, if there had not been any contract for the tithes of corn and hay, nor any rent reserved for them, would have been a sufficient payment at the time of making the statute of 31 H. 8. to have made the lands chargeable with the payment of the tithes of corn and hay. For the payment of wool and lamb was a sufficient declaration that the lands were merely discharged of the payment of tithes in respect of unity of possession, and therefore a payment of part of the tithes is as good as if all manner of tithes had been paid. 6thly. They held, that the payment of rent in lieu of the tithes was a payment of the tithes, and amounted to as much ; because the rent was reserved for the tithes, according to the book of 31 E. 3. where it was holden, that the seisin of an amercement for suit of court was a sufficient seisin of suit of court, &c. seisin delivered to the sheriff of a horse upon a recovery had of rent is a sufficient seisin of the rent according to *Perkins* ; and a seisin of a rose is a seisin of other rent that may accrue due afterwards, according to *Bevil's case* in the 4 Rep. (a) And as to the objection, that the rent does not issue out of the tithes because they are not manurable, they said that the rent issues out of them by way of recompence and by way of increase, because the rent would not be

(a) P. 8.

so large but in respect of them. And by *Croke*, upon an eviction of the tithes there shall be an apportionment of the rent, though it does not issue out of the tithes by way of remedy, so that a distress might be had of them, if the rent be arrear, or that upon an assize brought for the rent the tithes might be put in view. And by *Houghton*, if a bishop make a lease for years of tithes, rendering rent, and die, the rent shall not go to the successor, because there is not any local possession upon which a distress can be taken for it. 7thly. By *Dodderidge* and *Montague*, the retainer of the tithes of corn and hay by the lessee by virtue of the covenant is a sufficient payment of the tithes to put the owner of the lands out of the benefit of the statute of 31 H. 8. for the payment of itself by way of retainer is of the same nature with an actual payment; and the rent or tithes so retained shall be said to be things *in esse*, and an account shall be made of them accordingly; for which reason in 7 H. 7. the rent which the tenant had by way of retainer upon the descent of the mesnalty was as *in esse* as to the land; and *Perkins* in 41 E. 3. the feme tenant being to be endowed of the third part of the seignory by reason of her intermarriage with the lord, may retain the third part of the rent without any assignment of dower, and it shall be said as a payment to her; and 21 E. 3. *Exchange*, an exchange by release of a rent is good, because a retainer of a rent is all one with payment of a rent out of other land to him; and 45 Ass. pl. 36. where tenant for life recovers in value the rent reserved upon a lease for life, this retainer of the rent shall be of the same nature with the payment of a rent *in esse*; and where the lord disseises the tenant whereby he pays himself the rent by way of retainer, this rent so retained shall be recouped in damages upon an assize brought, as if it had been paid to him: but by *Croke*, if the parson disseise another of his land, in this case the tithes shall not be recouped in damages upon an assize brought, because tithes are a duty collateral to the land. 8thly. They resolved, that an action of debt on the statute of 2 & 3 E. 6. lay well enough for the plaintiff. For 1. the lands being discharged only in respect of a unity of possession, there was not any discharge in right, wherefore since the lands ought to have paid tithes, though there was no payment in fact of the tithes of corn and hay by the space of 40 years, yet an action may well enough lie upon the statute which hath the words "*or of right ought to be paid;*" for the statute goes to an absolute right of discharge. 2. Here has been a payment in kind of tithes of wool and lamb

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tithes of another kind are to be paid, this payment of tithes of another kind is a sufficient payment within the meaning of the statute. 3. The retainer of the tithes by way of covenant is a sufficient payment within the meaning of the statute. For if I contract for the tithes of *Blackacre* for forty years, and afterwards I purchase *Blackacre*, so that now I have the tithes by way of retainer; this having of the tithes by way of retainer will be a sufficient payment within the meaning of the statute, so that after the 40 years expired, if the tithes are not set out, an action of debt upon the statute of 2 & 3 E. 6. will well lie. But *Dodderidge* hesitated more upon this point than upon the other: for the statute of 2 & 3 E. 6. being a law which gives a remedy for not setting out tithes where there was before no remedy at common law, ought to be followed; and the statute directing that there must be a payment within 40 years to found an action upon it, that action fails if there has been no payment within forty years. Besides, it is to be observed, that the plaintiff who brings this action, is a layman, and a layman was not capable of tithes at common law, as we see in *Wright's* case in 2 Rep. (a) and therefore as the statute makes him capable of tithes and of suing for them, he must sue for them as the statute enables him. And he conceived that the insertion of 40 years in the statute, and neither a greater nor a lesser number of years, was for this reason, viz. for that by the canon law as 20 years possession makes a prescription for the church, so the being out of possession by the space of 40 years would be a sufficient prescription against the church, and therefore if there has been no payment of tithes for the space of 40 years, which makes a prescription against the church, there shall not be any remedy allowed upon this law to enforce a payment. And *Montague* said, that all lands were tithable at common law, but that afterwards the pope out of his respect to religious persons, discharged all the orders of monks from the payment of tithes; which being found inconvenient, for that *filia devoravit matrem*, *Paschal* the second confined the discharge to certain orders, viz. the Cisterrians, Templars, and Hospitallers, which orders also increasing, *Adrian* the 2d made a constitution that only those lands *quæ propriis ipsorum manibus excoluntur* should be discharged. And he said further, that the unity of possession which will make a discharge from the payment of tithes upon the statute of 31 H. 8. must be perpetual: but the payment of tithes at the time of the dissolution, be it perpetual or temporary, will be sufficient to charge the land with it.

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And afterwards *M. 17. Ja.* in another action of debt between the same parties, it was ruled in evidence, that tithes ought to be

(a) P. 38.

paid, and that there was no such union in this case as would make a discharge from the payment of them. (a)

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IN an action of debt upon the statute of 2 & 3 E. 6. c. 13. after verdict for the plaintiff it was moved in arrest of judgement by *George Croke*, that the declaration was insufficient, because it only stated generally that the plaintiff was seised of a portion of tithes of such lands, and made no title to the portion, which it ought to do, for a layman is not capable of a portion of tithes without special matter; and in 7 E. 6. Dy. 83. it appears that there is a manifest diversity between a rectory and a portion of tithes. *Sed non allocatur*; for by *Montague*, chief justice, *Croke*, *Dodderidge*, and *Houghton*, justices, there is no difference in reason between a rectory and a portion of tithes; for a layman without special matter is no more capable of the one than he is of the other; and as it has been often adjudged, that a claim merely as *proprietary* of a rectory generally without shewing any title is good enough, the declaration in the case at bar, though it disclose no title, must likewise be good enough. Besides, the action being an action founded on a tort, and to punish a tort; and not being founded upon a title, it cannot be necessary to set forth the plaintiff's title. If indeed it were an action founded upon title, so that the right might come into question, in that case undoubtedly a title ought to be shewn, and if the plaintiff shew an insufficient title he shall never have judgement.

A portion-ist may declare generally on the st. of 2 & 3 E. 6. without setting forth his title. *Cro. Ja. 437. S. C.*

It was next objected, that the declaration was insufficient, because it states generally the asportation of so much grain of several kinds, and yet does not state the value of each, as the precedents are, so that it may appear to the court, that the demand is according to law. *Sed non allocatur*, for the demand being of a certain sum, it is sufficient, though the value of each particular thing be not expressed.

In a declaration on the statute it is not necessary to state the value of every particular kind of grain carried away.

M. 15 Ja. A. D. 1617. In Chancery.

Dunn v. Burrell and Goffe. [MSS. Calthorpe.]

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THIS case, which was argued by sir *Francis Moor* serjeant at law, and *Walters* of the Temple, before sir *Francis Bacon*, lord keeper, assisted by the chief justices *Montague* and *Hobart*, and the justices *Dodderidge* and *Hutton*, was as follows:

The ancient rent was reserved upon a house in London,

(a) See *Benton v. Trot*. Mo. 528. *supra*, 208. *Dickinson v. Reade*, *infra*, 358. *Porter v. Bathurst*, 2 Ro. Rep. 142. *infra*, 373.

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and also a further sum by way of fine and income :
Qn. Whether tithes are payable under the decree of 37 H. 8. according to the ancient rent only, or according to the ancient rent and the sum reserved by way of fine and income?
See an abstract of the arguments in this case in *Cal-thorpe's Customs of London*, 93.

Burrell being seised in his demesne as of fee of a house called *Queen Acre*, and a shop and warehouse in the parish of *Gracechurch* in *London*, for which a rent of 5l. *per annum* had been usually paid, in the 3d of *James* made a lease by indenture for 5 years of part of the house and of the shop at the rent of 5l. *per annum*, payable at the four usual feasts by equal portions; and in that indenture of lease it was covenanted and agreed that *Withers* the lessee should pay 150l. in the name of a fine and income, which was distributed into several payments of 30l. each, to be made at the same feasts at which the rent of 5l. was reserved to be paid. The term expires. *Burrell* afterwards in 10 *Ja.* made a lease for 7 years by indenture to one *Goffe* of the said part of the house and of the warehouse, under the rent of 5l. *per annum*, payable by equal portions at the feasts of *St. Michael* the archangel and the *Annunciation*; and in the same indenture it was covenanted and agreed, that 175l. should be paid to *Burrell*, his heirs, executors, and assigns, in the name of a fine and income, by several payments of 25l. *per annum*, to be made at the same feasts, at which the reserved rent was to be paid by equal portions, that is, 12l. 10s. at the one feast, and 12l. 10s. at the other feast. *Dunn*, parson of the church of *Gracechurch*, preferred a petition to the mayor of *London*, stating that *Burrell* and *Goffe* did not pay him their tithes according to the rate of the fine that had been so reserved, and sentence being pronounced against him, he, upon the decree established by the statute of 37 H. 8. c. 12. which enacts, "that if any of the said parties find themselves ag-
"grieved with the end made by the mayor and his assistants, that
"then the lord chancellor of *England* for the time being, upon com-
"plaint to him made within three months next following, shall make
"an end in the same, with such costs to be awarded as shall be
"thought convenient," &c. exhibited his bill of appeal to the lord keeper, in which he set forth the whole matter *supra*, and the statute of 27 H. 8. c. 12. and recited that part of the decree which wills,
[300] "that the citizens and inhabitants of the said city and liberties of
"the same for the time being, shall yearly without fraud or covin
"for ever pay their tithes to the parsons, vicars, and curates of the
"city and their successors for the time being, after the rate here-
"after following; (that is to wit), of every 10s. rent by the year
"of all and every house and houses, shops, warehouses, cellars, and
"stables within the said city and liberty of the same, 16d. ob. and
"of every 20s. rent by the year of all and every such house and
"houses, shops, warehouses, cellars, and stables, and every of them,
"within the said city and liberties, 2s. 9d. and so above the rent
"of 20s. by the year, ascending from 10s. to 10s. according to
"the rate aforesaid. And where any lease is or shall be made of
"any dwelling-house or houses, shops, warehouses, cellars, or

“ stables, or any of them, by fraud or covin, reserving less rent than
 “ hath been accustomed, or is, or that any such lease shall be made
 “ without any rent reserved upon the same by reason of any fine or
 “ income paid beforehand, or by any fraud or covin, that then in
 “ every such case the tenant or farmer, tenants or farmers thereof,
 “ shall pay for his or their tithes of the same, after the rate afore-
 “ said, according to the quantity of such rent or rents, as the same
 “ house or houses, shops, warehouses, cellars, or stables, or any of
 “ them, were last letten for, without fraud or covin, before the
 “ making of such lease.” To this bill of appeal the defendants put
 in their answer, in which they set forth that there never was any
 greater rent reserved than 5*l. per annum*, and that they were ready
 to pay according to that rate; and they traversed the fraud and
 covin. To this answer *Dunn*, the complainant, demurred.

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More serjeant argued for the complainant. — I conceive that the
 decree of the mayor is erroneous in two points. — 1st. in not ad-
 judging the reservation of 5*l. per annum* by way of fine and income
 to be a fraudulent reservation to avoid the statute of 37 *H. 8. c. 12.*
 and 2dly. in not adjudging *Burrell* to pay according to the 25*l.*
per annum which he had so reserved by way of income. The
 case divides itself into two points. The first is, whether this
 reservation of 25*l. per annum* by way of fine and income be a fraud
 and covin within the decree, so that in determining the rate at
 which the tithes shall be paid, respect shall be had to it; and this
 is upon the body of the decree. The 2d point is, upon the addi-
 tional clause of the decree, which wills that if any lease shall be
 made reserving a less rent or no rent, &c. and it is whether respect
 shall be had to what was reserved by way of fine and income in the [301]
 lease to *Withers*.

As to the first point, it is evident by *Dr. Grant's* case that houses *Supra 259.*
 may by custom well enough be charged with the payment of tithes:
 for houses and shops being things in which persons exercise their
 trades and gain their livelihood, it is but reasonable that there should
 be a contribution to the minister out of them, as well as out of lands.
 In the case of *Green* and *Piper* in the king's bench in the 34th of *Supra 164.*
Eliz. where a prohibition had been granted upon a suggestion that a
 house in *London* was parcel of the possessions of an abbey which was
 discharged of the payment of tithes by virtue of a papal bull at the
 time of passing the statute of 31 *H. 8. c. 13.* of monasteries, a con-
 sultation was afterwards awarded, because the statute of 37 *H. 8.*
c. 12. was subsequent to the statute of 31 *H. 8.* and by that statute
 no houses in *London* were exempt but the houses of noblemen. This
 being so then, that houses by a reasonable custom may be charged
 with the payment of tithes, it now remains to examine the fraud in
 the case at bar; for the better discussion of which I would proceed

1617. by three gradations. The first of which shall be to shew what eye the common law had to fraud without the aid of any statute: The next shall be to shew what consideration the law had to encounter fraud for the evasion of any statutes in which there was not any express provision made against fraud. And the third shall be to shew the beneficial exposition of those statutes which have made provision in express words against fraud. As to the first point it appears by 34 *Eliz.* 1. *Garrante* 88. 19 *E.* 2. *Assets* 3. 13 *Eliz.* *Dy.* 291. that where tenant in tail after a feoffment with warranty of his lands in tail made a feoffment in fee of his lands in fee simple to his son and heir in order to avoid a descent of assets, it was adjudged to be a fraud at common law, so as not to prevent the descent of the assets. And the 24 *E.* 3. & 4 & 5 *Ma. Dy.* 160. where one indebted to the king had fraudulently with the king's money purchased lands in the names of his friends, those lands were holden liable to the payment of his debts. In *Fitzherbert's* case, 5 *Rep.* 79 *b.* a collateral warranty was avoided, and adjudged to be a warranty commencing by disseisin, by reason of fraud. And in 1 *Ma. Dy.* 99 *b.* a sale in a fair did not change the property of a horse, where the contract was made out of the fair. As to the second point, where any person would by a device evade a statute which has no express provision in it against fraud, the common law will throw in its aid and protection: and to that purpose, upon the statute of [302] *Gloucester*, c. 11. which gives remedy to the termor upon default of the reversioner, it was holden, that if the tenant vouch, and the vouchee make default, it is within the equity of the statute; for such slight shall not protect the fraud. And in *Elmer's* case, 5 *Rep.* 2. a surrender upon condition shall not be taken to be a surrender within the 13th of *Elizabeth*. And in 5 *Rep.* 14. *the case of ecclesiastical persons*, it is holden, that the losing by action tried in a writ of annuity after aid prier of the patron and ordinary is fraud within the statute of 13 *Eliz.* And in 11 *Rep.* 66. *b. Magdalen College* case, the permitting of a fine to be levied by the disseisor, and five years to pass, is within the statute of 13 *El.* which speaks of conusees. And 43 *Eliz.* in the case of *Pawlet and Fry*, it was ruled by *Popham* and *Anderson*, that where a dean and chapter borrowed 1,000*l.* which came to the use of the dean and chapter for the payment of their debts, and bound themselves in the penalty of 2,000*l.* for the payment of 1,000*l.* at a certain day, and afterwards a judgement was had upon this obligation, upon which a defeasance was made, that, if the dean and chapter, after the expiration of 15 years, should make a lease to *Fry* agreeably to the first contract, that then, &c. this judgement was avoided by the statute of 14 *Eliz.* which makes all covenants and bonds void, it being merely a fraud to evade the statute, which shall not be permitted. As to the 3d point, which is

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Cited in
Moore 789.

the beneficial exposition of statutes that have made an express provision against fraud, it is ruled by 21 E. 3. 28. that a release to an abbot of a rent is mortmain, notwithstanding the statute of *magna charta*, c. 36. wills *quod non liceat alicui dare*, and this cannot be said to be a *donation*. So upon the statute of 7 E. 1. *de religiosis*, which prohibits alienations to religious persons *arte vel ingenio*, it hath been adjudged, that a recovery by default without title is mortmain, as appears by the statute of *West. 2. c. 32*. So in 48 E. 3. 29. & 38. where a recovery has been upon the default of the vouchee; it hath been adjudged within the statute. So 3 E. 4. 14. an estate gained by way of estoppel upon *nul waste* pleaded, hath been adjudged within the statute. So a case in 14 *Ja. Rot.* 1026. in the common pleas, between *Winchcombe* and *Pulleston*, upon the statute of 31 *Eliz. c. 6*. which prohibits a presentation for money to a benefice with cure either directly or indirectly, it was ruled, that where *Say* for 90l. contracted with *Waller* to present him to a church after the death of an incumbent who then lay *in extremis*, and to that intent procured the next avoidance to be granted to one *Ebden*, who after the death of the incumbent presented *Say* without taking any money or reward, that this was simony, notwithstanding the person who presented received no money, because the grant of the next avoidance was part and derived out of the first contract, which was clearly simoniacal, and merely a trick to defraud the statute. And notwithstanding in 3 *Eliz. Dy.* 193. & 10 *Eliz. Dy.* 267. it was ruled, that a feoffment to the intent to defraud creditors shall not be construed to be a fraud to deceive the king, because it was not made with that intent; yet, upon the first clause in the statute of 27 *El. c. 4*. which mentions fraudulent conveyances made to the intent to defraud purchasers, it is ruled in *Burrell's case*, 6 *Rep.* 72. that where a lease was assigned in order to avoid an extinguishment, it was fraud within that statute: and upon the second clause of the statute which speaks of estates made with power of revocation, it is ruled in *Bullock and Standen's case*, 3 *Rep.* 82 *b.* that a power of future revocation after the death of another, or a power of revocation with the assent of others, shall be deemed a fraudulent conveyance within that clause of the statute. In the case at bar then, which is a case which affects religion, which is a case that concerns our God, a favourable construction shall be made, that this slight of a reservation of rent by way of fine and a sum in gross, shall not defeat the parson of that which is justly due to him.

As to the 2d point, which is upon the additional clause of the statute made to meet future fraud, it consists of two mischiefs and one reason. The first mischief is, where a lease is made of a house, and there is a reservation of less than the accustomed rent. The second mischief is, where there is no reservation of any rent at all.

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1617. And here we are within one of the mischiefs; for whereas under *Wither's* lease there was a reservation of 35*l. per annum*, here there is a reservation of only 30*l. per annum*, and so there is fraud and covin, as has been proved above. And there is not any fine or income paid before-hand, as the statute mentions, but it is future, if any be, which shews the fraud more apparently. And if a greater rent than the ancient rent be reserved, it is out of both of the mischiefs of the additional clause; so that I conceive if a lease of a house in *London* be made *bona fide* for natural affection to the son of the lessor without reserving any rent, the parson will lose his tithes: for it is out of the additional clause, the non-reservation of any rent being in respect of the advancement of the son, and not in respect of any income paid, or by reason of fraud and covin. But, if the lease be made only in trust for the lessor, then it will be within the additional clause, for the trust shall be said to be fraud and covin, and so it will be within the penalty of the statute, which says that the parishioner shall pay his tithes according to the rate of the ancient reservation; wherefore in the case at bar, *Goffe* and *Burrell* must pay their tithes according to the reservation under *Wither's* lease, which shall be said to be made by fraud and covin as well as the reservation under the lease to *Goffe*. And the last clause which gives the penalty that the parson shall have at the rate of the ancient reservation, does not take away the benefit of the first clause, which gives him the tithes according to the rate of 2*s. 6d.* for every 20*s.* rent. So upon the statute of *West. 2. c. 3.*, where the one clause gives to a feme a *cui in vita*, if the other clause gives to her a receipt for the default of her baron, it hath been adjudged in 38 *E. 3. 12.* that if a feme being received for the default of her baron make default, whereby a recovery is had against her, yet, after the death of her baron, she may well have a *cui in vita*; for the latter clause does not take away the benefit given to her by the former. So, upon the statute of 27 *El. c. 2.* which has one clause as to conveyances made with intent to defraud purchasers, and another as to conveyances made with a power of revocation, it hath been adjudged in the case of *Standen and Bullock*, cited in *Twine's* case, 3 *Rep. 86.* that a *bona fide* purchaser shall have the land, where the power of revocation has been extinguished by fine or any other such instrument, for the latter clause respecting a power of revocation does not deprive the purchaser of the benefit of the former clause.

As to the objection, that this which is reserved by way of fine and income, is a sum in gross, and not a rent, because it is not incident to the reversion; I answered that it has the properties and qualities of a rent. For the fine is reserved in the same deed and at the same time with the rent; it is made payable at the same time

with the rent, and the same means may be taken for the recovery of it; for the lessor may either distrain for it, or have an action of covenant. This being so, it is at least a rent in reputation, though it be not a rent *re verâ*; and if it be a rent in reputation, that will be sufficient within the statute of 37 H. 8. c. 12. as a chantry in reputation shall be said to be a chantry within the statute of *chantries*, as we see in *Adams and Lambert's* case, in 4 Rep. 104. and in 5 Rep. 3. *Jewel's* case, where there was a rent reserved upon the lease of a fair, it was said to be a rent in reputation, and that an action of debt would lie upon the contract.

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Walter contra.—The case, he said, was briefly this—*Burrell* [305] being seised of a house which from time immemorial had been let for 5*l.* *per ann.* makes a lease of part of it, reserving the rent of 5*l.* *per ann.* with a covenant also for the payment of 175*l.* in the name of a fine and income to be paid in several sums of 25*l.* *per ann.* during the term (that is) 12*l.* 10*s.* at the one feast day in the year whereon the rent was made payable, and 12*l.* 10*s.* on the other feast day. And I insist that the parson is only to have his tithes after the rate of 5*l.* *per ann.* and not after the rate of 30*l.* *per ann.* To support this I will shew in the first place that tithes were not due for houses by the common law of the land, and before the making of any statute to that purpose. 2dly. I will shew that the constitutions and ordinances of the pope cannot make tithes payable for those things which are discharged of common right. 3dly. I will shew that an act of common council in *London* cannot lay the imposition of tithes upon houses discharged by the common law of the land. 4thly. I will shew that the words of the decree and act of 37 H. 8. c. 12. do not extend to the fine and income in the case at bar. 5thly. I will shew that by the equity and intent of the statute, tithes are not to be paid according to the rate of the fine and income.

As to the 1st. of common right and by the common law of the land, tithes are not due, nor are they payable of any thing but what yields an increase and a renewing profit, and not of those things which neither increase nor renew, but rather decrease; of which nature are houses, which require repairs; and therefore it is said in *F. N. B.* 53 *E.* that tithes shall not be but of such things as increase from year to year by the manure of man. 2d. Houses being of the inheritance, and the rent reserved being of the same nature, tithes are not payable of them; for by the rule in law tithes are not to be paid of any part of the inheritance, but only of those things which renew; and it is for that reason that tithes are not payable of coals, slates, &c. for they are part of the inheritance and not renewing. 3d. Houses being things necessary for habitation, and contributing to the benefit of the parson in another way, tithes are

1599. not to be paid for them; and upon this principle it was adjudged in the king's bench in 31 *Eliz.* that tithes are not payable for the agistment of draught oxen, because they are used in the cultivation of the land, and tend to the benefit of the parson in another way. And in *Broughton's* case, in the king's bench in 32 & 33 *Eliz.* it was ruled, that tithes are not payable for the agistment of draught oxen or a riding gelding, because they yield an increase in another way, and are things of necessity and of help. In the case at bar then, houses are things of necessity for the rest and habitation of man, and for protection against the weather; and not giving any increase, (for there is neither grass nor corn raised in them), tithes ought not to be paid for them. And *Finchden*, in 38 *E. 3.* says, that the only tithes in *London* are oblations and obventions called rate-tithes, and that there are no other. And as custom may discharge a spiritual person from the payment of tithes, I do not deny but that custom may create a rate-tithe, and charge those things with the payment of tithes, which of themselves are discharged in law, as is agreed in *Dr. Grant's* case, 11 *Rep.* and accordingly we see in the decree of the statute of 37 *H. 8.* that the houses of noblemen are discharged of rate-tithes. In the case of *Dawson and Green*, in the king's bench, in 34 *Eliz.* and in *Dr. Leyfield's* case, in the common pleas, in *Tr. 14 Ja.* it was adjudged, that houses were at common law discharged of the payment of tithes.

As to the second point, respecting the validity of the ordinances and constitutions of the pope, I submit, that an ordinance of the pope cannot bind my temporal inheritance: and therefore where there was an ordinance of the pope for the payment of 2s. 6d. in every pound of rent reserved in *London*, it was of no validity; for the pope, though he had power to dispense with any act done against the canons of the church, as we find by 2 *H. 4.* yet he had no power to alter the law and to charge my inheritance: and therefore, though he might dispense with the holding of several benefices, and though he might by his dispensation empower one to hold a church *in commendam*, notwithstanding his entry into religion, (for these are merely dispensations with the canons of the church), yet he could not alter the law of the land, and charge the inheritance of any man. It hath been thereupon adjudged, that a provision made by the pope is void in law against the patron, inasmuch as it is an impoverishment of his inheritance. So, a licence by the pope to a monk to hold a temporal inheritance is void in law according to 3 *H. 6.* for the entry into religion being a civil death, the monk cannot, by the common law, have the land afterwards. So, in 1 *H. 7.* it is agreed, that the pope cannot make a sanctuary, though he may consecrate it after it is made by the king. So, in

Grendon's case † it is holden, that the pope cannot make an appropriation, any more than he can make a union according to 11 *H.* 7, for it concerns a temporal inheritance.

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† *Supra*
136.

As to the third point, namely, the power of the common council in *London*: though an act of common council may bind men in point of order and government, yet it has not power to bind them in point of their inheritance. The act, therefore, of the common council, which, together with the constitution of the pope, imposed upon every inhabitant of *London* who paid 10s. rent, an offering of a farthing on the vigil of every feast day, which were 85 in number, was not binding. For, as it appears in 5 *Rep.* in the *Cases of Bye-laws*, though the tenants of a manor may make a bye-law that a commoner shall not turn his beasts upon the common until such a day, yet they cannot make a bye-law to exclude a commoner from his common, because that concerns his temporal inheritance, which cannot be bound by such a bye-law.

As to the fourth point, the body of the act being for the payment of 16*d.* for every 10s. rent, the letter of the act extends only to the case of a rent, so that if there be no rent, then the body of the act will not extend to it; and the fine of 25*l.* which is to be paid annually over and above the 5*l.* is not a rent: 1st. Because it does not issue out of the land. 2dly. Because there can be no distress for it of common right, as for a rent. 3dly. Debt will not lie for it, as for a rent. 4thly. It is not incident to the reversion. 5thly. It will not descend to the heir, as a rent will; as in a case of 10 *Eliz. Dy.* where a covenant was to pay a sum in gross to another and his heirs, it was holden, that it could not descend. 6thly. If part of the reversion be granted away, there will be no division or apportionment of it, as there would be of a rent. 7thly. An entry of the lessor into part of the house will not cause a suspension of it, as it would of rent, according to the resolution in *Albany's case*, in 33 *Eliz.* where there was a proviso to pay such a sum as in the present case annually; and it was holden, that entry into part did not suspend the condition. It being then no rent, the letter of the decree of 37 *H.* 8. will not extend to it; and if it be not within the letter of the decree, neither will it be within the equity of it; for it is a penal law, and therefore shall not be extended by equity. 2dly. The body of the act directs that there shall be a payment without any fraud and covin; so that the body of the act only makes it to be a fraud and covin where the payment is not according to the quantity of the rent; and the fraud and covin, if there be any, will not make that to be rent, which the law says is not rent. And to talk of fraud against the common law, and against the statute, is not to the purpose; since the whole question arises merely upon the act which creates the payment of tithes

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that the tithes of houses in *London* should have a like increase; I answer, 1st. That the tithes of houses in *London* are only a rate tithe; and where there is a *modus decimandi* for lands in the country there is not any increase. 2dly. As lands improve, so there is an increase of houses in *London*, which yield a benefit to the minister. 3dly. Lands yield an increase of their own nature; but houses do not, but require a great charge to maintain them; so that there is no reason that the tithes of houses should increase as those of land do. And the statute of 2 E. 6. discharges barren lands, which require great expence for their manurance, from the payment of tithes for seven years. In the case of *Scudamore* and *Bell* (a), in the common pleas, *Mich. 3 Ja.* it was adjudged, that there could not be fraud averred for the sum that was reserved by way of fine; for it being a rent only in imagination, and the ancient rent being reserved, it shall never be taken that it was the intent of the statute to extend to it: but, if there had been no rent at all reserved, in respect of the sum in gross to be paid in future, or, if there had been a reservation of a greater rent only for one year; in either of those cases the additional clause of the statute would give relief.

The lord keeper said, that the question rests merely on the body of the act; and that there is no colour to bring the reservation in this case within the clause which speaks of the reservation of no rent, or of a less rent: but the only question is, whether this imitative rent be a rent within the body of the act. He said farther, that there is no question but that the statute extends to the case where a greater rent than the ancient rent is reserved: and he advised the counsel to take into their consideration what authority the lord keeper had upon appeal from the mayor, and in what manner he was to proceed. *Et adjournatur.*

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Afterwards, in *Easter* term, 16 *Ja.* at the request of sir *Francis Bacon* lord chancellor of *England*, a special commission was granted to the archbishop of *Canterbury*, the lord chancellor, the earl of *Suffolk* lord treasurer of *England*, the earl of *Worcester* keeper of the privy seal, the earl of *Pembroke* lord chamberlain of the household, the bishop of *London*, the bishop of *Ely*, sir *Henry Montague* chief justice of the king's bench, sir *Henry Hobart* chief justice of the common pleas, sir *Julius Cesar* master of the rolls, *Dodderidge* one of the justices of the king's bench, and *Hatton* one of the justices of the common pleas, in which there was a recital of the question depending between *Dunn* of the one part, and *Burrell* and *Goffe* of the other part, and power given to them to hear and determine that cause, and likewise to mediate between the ministers of the churches in *London* and the citizens of *London*, and to make an arbitrary end between them, whereby a competent provision might

(a) 2 Inst. 660. by the name of *Skidmore* and *Eyre* v. *Bell*. *Supra* 228.

be made for the ministers, and too heavy a burden might not be imposed upon the citizens, and commanding them to certify to the king what they should do in the premises.

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The case therefore was now argued at *York House* by sir *Henry Finch*, one of the king's serjeants, for the plaintiff. Before I go (he said) into the particular question now to be treated of, I will shew in what manner and how tithes and offerings ought to be paid in *London*. Astothis, *Lindwood*, in his book *de Decimis* (a), in the chapter *Sancta Ecclesia*, in his gloss on the word *Negotiationum*, saith, *quod artifices et negotiatores civitatis London ex ordinatione antiquâ in dictâ civitatē observatâ tenentur singulis dominicis diebus et in principalibus festis sanctorum apostolorum et aliorum quorum vigila jejunantur offerre pro singulis decem solidis redditus domus quam inhabitant unum quadrantem. Et ordinatio prædicta indifferenter arctat quoscunque inhabitantes, sive sunt artifices, sive mercatores, sive quivis alii.* This ordinance mentioned by *Lindwood* had reference to a constitution made by *Niger* bishop of *London* in 13 H. 3. A. D. 1228, which was confirmed in 21 R. 2. by *Thomas* then archbishop of *Canterbury*, and afterwards by pope *Innocent* in 5 H. 4. And subsequent to that, in 31 H. 6. pope *Nicholas* ordained by his bull, that tithes should be paid of houses in *London* as above, a valuation being made of them according to the true and usual value of houses, and the rate according to that proportion amounted to 3s. 5d. in the pound for each house; for there were 82 vigils of saints that were fasted, and of *Sundays*. In 36 H. 6. there was a composition made between the citizens and clergy of *London*, that a payment should be made by the citizens for their houses according to the above rate, and if the houses were kept in the hands of the owner, or if they were leased out without reserving any rent, the churchwardens of the parish where the houses were, should set down a rate of the houses, and according to that rate a payment should be made. In the 14 E. 4. an act of common council in *London* passed for the confirmation of the bull granted by pope *Nicholas*. But there being afterwards a great variance between the clergy and citizens, they submitted themselves to the award of the lord chancellor and several others of the privy council, who in 1535 made an order that every inhabitant and citizen should pay at the rate of 16d. for every house, and in 27 H. 8. there was a proclamation made for confirming that order; and in the same year, as it appears by the statute of 27 H. 8. c. 15. there was a statute made to ratify the said order, and a proclamation issued as I have mentioned, until an order for the payment of tithes should be made by thirty-two persons to be nominated by his majesty. But no such order being thereupon made, the king making

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(a) Lib. 3. p. 91.

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no nomination, and other disputes arising concerning the payment of tithes and offerings, by the statute of 37 H. 8. c. 12. a submission was made to *Thomas Cranmer*, archbishop of *Canterbury*, sir *Thomas Wriothesley* knight, lord chancellor of *England*, *Thomas* duke of *Norfolk*, and several others; and it was enacted, *that such end, order, and direction, as should be made, decreed, and concluded by the aforementioned archbishop, lords, and knights, or any six of them, before the feast day of March next ensuing, of, for, and concerning the payment of tithes, oblations, and other duties within the said city and liberties of the same, and enrolled in the king's high court of chancery of record, should stand, remain, and be as an act of parliament, and should bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons, vicars, &c. according to the effect, purport, and intent of the said order and decree so to be made and enrolled.* In consequence of which an order was afterwards made by all the commissioners, except the duke of *Norfolk*, and sir *Richard Lyster* knight, chief justice of *England*, that the citizens and inhabitants of *London* should pay at the rate of 2s. 9d. for every pound of rent that was paid for the houses. And upon two branches in this order or decree the present question arises. The first of these branches is, *that the citizens and inhabitants of the said city, &c. shall yearly without fraud or covin for ever pay their tithes to the parsons, &c. after the rate hereafter following, (that is to wit), of every 10s. rent by the year 16½d. and of every 20s. rent 2s. 9d.* The second branch is, *And where any lease is or shall be made of any dwelling-house, &c. by fraud or covin, reserving less rent than hath been accustomed or is, or that any lease shall be made without reserving any rent upon the same by reason of any fine or income paid beforehand, or by any fraud or covin, that then in every such case the tenant or farmer, &c. shall pay for his or their tithes according to the quantity of such rent or rents, &c. as the same were last letten for without fraud or covin before the making of such lease.* The only question then in this case will be, whether there shall be 2s. 9d. in the pound paid according to the rate of 5l. or according to the rate of 25l. *per annum*, which is reserved annually by way of income. And this question, though in this particular it is of no great moment, because it is but for a trivial sum beyond what is paid, yet in its consequence it is of very great importance, so that it may not only be said that it is *magnum in parvo*, but that it is *maximum in minimo*, and the cause may be termed a maiden cause, there having been none of this nature before; and it comes properly under the meridian of the court of chancery, the chancellor being the proper judge of it, and the person to whom it is principally referred. And I am of opinion that judgement ought to be given for the plaintiff; for I conceive that this rent of 25l. *per annum*, which is reserved by way of fine and income, is a rent

properly and truly within the words and letter of the decree. For 1st. the etymology and genuine propriety of the word *rent* shews that it is so. 2d. It is so in common acceptation and according to the popular use of the word. 3d. It is a rent in the judgement and eye of the law. 4th. It is a rent in the understanding of the spiritual and ecclesiastical law; so that being a rent all these four ways, it would be hard that it should not be a rent within the words of the decree. — As to the 1st. in Latin a rent is called *redditus, ita dictus a redeundo sive a reddendo*, inasmuch as all profits of what kind soever that come in annually, may be properly termed a rent, according to the opinion of *Lindwood* 64. in his chapter *Quoniam autem*, and gloss on the word *redditus*. For he says, *quod vocabuli redditus significatione intelligitur omnis fructus, et est generalis ad omnem utilitatem*. If so, then this rent of 25*l. per annum* reserved by way of income, cannot but be called a rent. — As to the 2d. its being a rent in common acceptation, I say, that words are of the same nature as coin is; and as coin must be received according to its current value, so words must be taken in their current sense; and so it is said, *communis usus loquendi prævalet communi significatione verborum*. And therefore in 34 *E. 3.* 24. it appears that a remainder limited to *Richard* the son of *Richard Marwood* is good, notwithstanding he be a bastard, and so in law *nullius filius*, because in common reputation and understanding he is known by that description. So in *sir Moyle Finch's case*, 6 *Rep.* 65. where a fine was levied with an exception of the manor of *Bramstone*, it was holden, that notwithstanding there was no such manor *re verâ*, yet as there was such a manor in common reputation the exception was good enough. So in *Carter's case* in 25 *Eliz.* it was ruled on the statute of 1 *H. 5. c. 5.* that an addition by which a man is commonly known is a sufficient addition, though it be not his true addition, and therefore the addition of gentleman in the indictment was good, notwithstanding the party was in fact a yeoman; in the case at bar therefore the 25*l. per annum* being a rent in common acceptation (for if *Goffe* were asked what rent he paid, he would answer 25*l. per annum*) it shall be a rent within the words of the decree. — As to the 3d. *viz.* the judgement of law of this rent, I insist that, notwithstanding the rent in the case at bar is not any one of the three rents mentioned by *Littleton* in his chapter upon rents, yet that is no argument that it is not a rent in judgement of law: for there are many annual sums which the law calls a rent, and yet they are not any one of the three rents mentioned in *Littleton*: and therefore in the *Register* 158. and 159. you will see that the writ calls every annuity a rent; for it is said in the writ, *præcipimus tibi quod justiciis A. quod justè, &c. reddat B. centum marcas, decem quarteria frumenti et viginti robas, quæ ci a*

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(a) Lib. 1. p. 33.

(b) Lib. 3. p. 76.

And here I cannot but take occasion to commend the nobleness of our law, which, though it is the *primum mobile* that attracts all the planets, yet applies itself to all other professions, and becomes all things to all men, that it may do justice to all; and therefore in matters which belong to grammarians to discuss, it gives judgement according to the opinion of grammarians, as in the case before cited, and with respect to the meaning of the word *puero* in *Dy. 337 a.*: and where the matter is of a spiritual nature, and it belongs to the spiritual judges to discuss it, it gives judgement according to the spiritual law; and therefore in *Cawdrey's case, 5 Rep. (a)* an allowance was made to the pleading of a sentence in the ecclesiastical court according to the form there prescribed: and where the thing is customary and concerns a custom, it gives judgement according to the custom; and therefore in *24 E. 3. 14.* where an action of accmpt was brought by an heir in gavelkind when he was only 15 years of age, it was holden, that an action brought at such an age was well enough, inasmuch as it was the full age of an heir in gavelkind according to the custom; and yet by *F. N. B. and Littleton*, the age of an heir at common law upon the statute of *Marlbridge* at which he may bring an action of accmpt is not until he attains the full age of 21 years; and so, where an administration of the goods and chattels of an intestate is committed according to the statute of *31 E. 3. c. 11.* the administrator shall have a defeasance avoiding an obligation, and other such things; and yet they would not pass under the general words of goods and chattels: but rather than that the law will fail of giving remedy, it will apply particular words to general things. And for that reason in *8 H. 6. 34. Br. Leasc, pl. 71.* where the king made a lease by these words *committimus tibi tales terras, &c.* it was holden to be a good lease, and the law remitted somewhat of the strictness of the words to apply them to the ancient usage of the exchequer. In the case at bar, therefore, the law will apply this *25l. per annum* so annually reserved to a rent, and will construe it to be a rent, in order that the parson may receive what is due to him under the decree. But 2dly, admitting that the *25l. per annum* were not a rent within the words and letter of the decree, yet it is a rent within the intent and meaning of it. And the decree may be taken by equity, 1. because it was *pro bono ecclesiæ*, and so concerns our God, and for that reason a liberal construction is to be made of it. 2. Because it conduces to the maintenance of religion, *et summa ratio quæ pro religione facit.* 3. Because it tends to the avoiding of fraud which here stares in our face, and it is the *Cacus* to conquer which is one of the labours of *Hercules*: and if penal laws, which trench upon the estate or life of a man, shall be taken by equity, as we find by

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Littleton, § 67. who holds that an action of waste upon the statute of *Gloucester*, c. 7. may be well maintained against one who is tenant for half a year, notwithstanding that the statute only speaks *de dismissione ad terminum annorum*; and by *Plowden* 467. who is of opinion, upon the statute of 1 E. 6. c. 12. that clergy shall be taken away from a man who steals a *horse*, notwithstanding the statute only speaks of those who steal *horses* in the plural number; then *a fortiori* shall this decree, which is *pro bono ecclesiæ*, and tends to the maintenance of religion and the suppression of fraud, be taken by equity. And therefore it seems that if the rent of a robe, or of quarters of corn or grain, be reserved upon houses in *London*, and there are such rents, as we have seen above from *F. N. B.* and the *Register*, the parson shall have tithes of such rents according to the value of those things, and yet they are not within the words of a rent of a sum certain. And if the lessee by the same indenture by which the lease is granted, covenants to pay 10*l.* *per annum* to the lessor of a house in *London*, this is a rent within the intent of the decree, so that the parson shall have tithes of it. 4. The consideration which is decreed is not by way of amplification for the increase of the parson's revenues, but rather by way of diminution; for whilst the ordinance of *Niger* bishop of *London*, the pope's bull, and the constitution made by the common council, allow 3*s.* 6*d.* in the pound annually, now this decree gives only 2*s.* 9*d.* in the pound *per annum*, and is an argument that the decree should be taken by equity. Besides, this decree not enacting any thing new, but only making a provision that whereas such offerings and at such time were paid for houses in *London*, there should be now such a sum according to such a rate paid at such a time, it is reasonable that a liberal construction should be given to it. And as to the objection, that the constitutions of the bishop of *London*, the pope's bulls, or the acts of the common council, cannot impose any charge upon the inheritances of men, I will not maintain that they have any such power; but I say that, before any of those ordinances were made or papal bulls granted, there was by the custom of *London* such a duty due out of the houses in *London* to the parsons, as it appears by *Dr. Grant's* case, 11 *Rep.* where it is holden, that a suit may be maintained in the spiritual court for those duties. And the original instrument of *Niger's* ordinance and the pope's bulls shew as much: for it is said that the citizens of *London* shall pay such rates *prout etiam eatenus longè retroactis temporibus et tempore præscriptibili per parochianos ecclesiarum dictæ civitatis consuetum extiterat*. 5. It appears by the ordinances that the rates shall be paid *prout domus et hospitia locabantur, sive locari poterant, secundum veram æstimationem*: the ordinances of ancient time therefore being so, and there being now an alteration in the manner of the rates, it is reasonable that this decree should be expounded

Supra 259.

according to the ancient ordinances; and that as the reservation of 25*l. per annum* by way of fine and income tends only to defraud the parson of his tithes, according to a due proportion, and would have been a fraud cursed with *bell, book, and candle* in ancient times, and as it shews that the house is of such a value to be leased, and would have been leased at that value, according to that rate, then should the tithes be now paid. 6. As the decree has by an equity been interpreted for the disadvantage of the parson, by the same reason should it be expounded by an equity for his benefit and advantage; and therefore, in 21 *Eliz.* in the king's bench it was adjudged, that where the owner of a house in *London* paid a rent to the king which was given to him by the statute of 1 *E. 6. c. 14.* made against superstitious uses, he should only pay tithes according to the value of the house beyond that rent, and not according to the true value: and the law should be the same, where he paid a quit rent or a rent charge to another out of the house: for it is not reasonable that he should pay tithes according to the true value out of the house, and yet should be chargeable farther with a rent to another person. So then in the case at bar, since the owner has a benefit upon the reservation of the 25*l. per annum* by way of income, it is reasonable that the parson should be respected according to that benefit which arises to the owner. As to the objection, that here is not any fraud at the common law, nor fraud within the meaning of this decree, because the rent in which the fraud is supposed to be committed, and the person against whom it is intended were not *in esse* at the time, I deny the ground of it, because it is repugnant to several acts of parliament: for it appears by the statute of *Marlbridge, c. 6.* that where the tenant enfeoffed his first-born son or a stranger by collusion to defeat the lord of his wardship, it was fraud at the common law, and it is also fraud by that statute; and yet the lord against whom the fraud was committed had no present right. So, where one, pending an action against him, makes a feoffment to his friends to the intent to hinder execution from being had against him of his lands; this is fraud by the common law according to 13 *Eliz. Dy. 294.* and it is also declared to be so by the statute of 27 *Eliz. c. 4.* and yet the judgment which made the land chargeable was not in being when the feoffment was made. And I am of opinion, that if there be a sale of lands without any consideration, and afterwards the grantor become indebted to the king, such lands will be liable to the king's debt. As to what has been put on the 34 *E. 1. Garranty 88.* that if before any purchase of the lands in tail the tenant in fee make a feoffment of his lands, and afterwards purchase lands in tail and make a feoffment with warranty, there is no fraud at all in that, and therefore it is not to be resembled to other cases where there is fraud. And as to the objection which has been made, that the

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second branch of the decree shews that here has not been any fraud, inasmuch as the rent which was of ancient time reserved is here paid, and the second branch aims at no more than this, because where the ancient rent is not reserved upon a lease, or there is no rent at all reserved, the penalty is only to pay tithes according to the proportion of the ancient reservation, I answer, that there has been a greater rent in time past than there is now: for there has been a reservation before in the same manner as the reservation is now made; so that notwithstanding *Burrell* has hoped to deceive the church by this fraudulent reservation by way of income, yet there being fraud in the intention and purpose, and fraud in the execution, *non ita effugiet, et fallere fallentem non est fraus*, and by reason of the preceding reservation he shall be forced to pay tithes according to the rate of it.

An argument that tithes should be paid according to the rate of the reservation by way of fine and income may be well enough drawn *a convenienti*. For justice being the rule of conveniency, and the law being the rule of justice, if the law be that tithes shall be paid according to that proportion, then it cannot be denied but that it is also convenient. And that the law is so, is manifest, 1st. from human provisions, that is, the common and statute law, of which as I have made mention before, I shall not insist upon them now. 2. It is *jus divinum*; for though the canonists differ upon the question, whether *decima pars* be due *jure divino*; yet they all agree that there is a *convenient* portion due for the maintenance of the minister: whence it follows that this proportion of 2s. 9d. in the pound being manifestly a *convenient* portion for the maintenance of the minister, the subtraction of it is *contra jus divinum*. 3. The law of the custom of the city says, that a payment ought to be made according to the reservation of rent, as we see by Dr. *Grant's* case, 11 Rep. *et consuetudo ex rationabili causa usitata privat communem legem*, be it the *jus scriptum*, or the *jus non scriptum*. 4. The law of the *consulta prudentum* has directed the payment of tithes for houses in *London* to be made in this manner; as *Niger* bishop of *London* in the time of H. 3. pope *Innocent* in the time of H. 4. pope *Nicholas* in the time of H. 6. the order, decree, proclamation, and statute, in the time of H. 8. which payment therefore ought to be now continued accordingly, not fraudulently subtracted contrary to law and justice. 5. The law, from the danger to which the ministers of *London* expose themselves more than other ministers of the country do, requires the payment of tithes at the hands of their parishioners according to the due proportion allotted to them. For they are bound to be resident, and to give comfort to their flock, in the time of the plague, when their bodies are subject to the danger of infection, their minds to fear, and their souls to sorrow; so that being in

Supra 259.

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greater danger than other ministers are, they ought to have a greater reward than others have. There are many other conveniences which I will not now insist upon, because in speaking of them at this time and in this place, I should be like a *Phormio* teaching the precepts of war to an expert *Hannibal*. And as to the objections which have been made, that if tithes were to be paid *secundum veram æstimationem*, every parish would be as great in value as a bishoprick, I answer, 1. that this parish of *Gracechurch*, being a parish consisting of very few families, is not in any danger of that abundance. 2. The value will not be proportionally greater now, than it was before the making of the statute of 37 *H. 8.* at which time there was a greater sum paid. 3. Where the parishes are so large, there is a means afforded of associating other learned men to them, and of endowing vicarages. And as to the objection that houses are for expence and hospitality, and therefore not to be resembled to land, I answer, 1. that that objection might have been made before the statute, and there is no better ground for it now than there was then. 2. The statutes of 27 *H. 8.* & 37 *H. 8.* do not conceive any deduction to be necessary for the repair of houses, as the 1 *E. 6.* does for barren ground, and therefore they made no provision for it, nor are we to make any. 3. The law favours agriculture more than houses, the one being more beneficial to the commonwealth than the other.

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In the following term, viz. *Tr. 16 Ja.* the case was argued in the same place by sir *Tho. Coventry*, the king's solicitor, for the defendant. He said, I shall consider, 1. how the case stood before the decree. 2. I shall consider the several parts of the decree. As to the 1st point, before the decree and the act of parliament, there were not any tithes due by the course of the common law of houses in *London*. 1. In regard that tithes are only due of such things as yield an increase, of which nature houses are not; for they rather decrease, than increase, inasmuch as they require reparations. 2. Tithes are due out of the profits and revenue of things, and do not charge the inheritance; and it is for that reason, that they are determinable in the ecclesiastical court; for if they charged the inheritance, then they would be determinable at common law: but of houses there is no profit or revenue, and therefore tithes cannot be due of them. 3. Tithes are things collateral to the land, and not issuing out of the land, and therefore, according to 42 *E. 3.* 13. & 30 *H. 8. Dy.* (a) the parson shall have tithes of land contrary to his own feoffment or lease; and in 7 *E. 6. Dy.* (b) in an assize for a portion of tithes, it appears that it is not necessary to name the tenant. But, if tithes were to be paid of houses, then they would issue out of houses, which is contrary to the rules of law. 4. It

Supra 118.

Supra.
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(a) P. 45. a.

(b) P. 83. a.

1617. *Dunn v. Darrell and Goffa.* *Supra* 259. *Supra* 263. has been often adjudged that houses are discharged from the payment of tithes by the common law without a special custom; and for that reason, in 39 & 40 *Eliz.* in the common pleas, between *Dalison* and *Romer*, it was adjudged that tithes were not due of houses, and with that accord the resolution in *Dr. Grant's* case, and the case of *Dr. Layfield*, in the 12th of *James* in the common pleas.
2. Notwithstanding tithes were neither paid nor due for houses in *London*, yet from the beginning the ministers of *London* had a competent provision made for them by glebe which was given to them, oblations, obventions, and other casual duties, which arose upon marriages, christenings, burials, and such other things, as it appears by 30 *E. 3.* & 38 *E. 3.* 13.; and by the records in *London* it appears that the offerings for houses in *London* were paid in this manner: for he who paid 20s. rent, on every *Sunday* or every apostle's day, the vigil of which was a fast, paid a half-penny; or, if he paid but 10s. rent, he was to pay only a farthing; which amounted at the most but to 2s. 6d. in the pound; and sometimes indeed it was less, as, when one of the apostle's days fell upon a *Sunday*, for then there was only one halfpenny or farthing paid for both. And this manner of payment rather decreasing, it was established by a constitution of *Roger Niger* bishop of *London*; and it so continued without any alteration till the 13 *R. 2.* when *Thomas Arundel* archbishop of *Canterbury* made an explanation of the constitution, and obtruded upon the citizens of *London* twenty-two days more than were usual, which raised the sum to 3s. 6d. in the pound. And this explanation was confirmed by pope *Innocent* in 5 *H. 4.* and afterwards by pope *Nicholas* in 30 *H. 6.* But there was a constant struggle on the part of the citizens against this explanation, and the records of *Guildhall* in 32 *H. 6.* state this order of explanation to be *destructorius* rather than *declaratorius*, and to be obtained *surreptivè et abruptivè* without summoning the citizens, and without any assent to it on their part; and thereupon there was after that time a perpetual agitation between the ministers and citizens of *London* in the court of *Rome* and in the ecclesiastical courts about the payment of those offerings, until at length it was settled by the decree made in 27 *H. 8.* when it was established according to the purport of the decree. And upon the several parts of this decree arise the two questions which have been made and argued on the other side: the first of which is, whether, as the 25*l.* were reserved by way of fine and income payable during the term at the same days and feasts as the rent of 5*l.* is payable, whether tithes shall be paid according to the rate of 5*l.* only, or according to the rate of 30*l.* and if the 25*l.* shall be said to be a rent? 2. Whether the reservation of this 25*l. per ann.* by way of fine and income shall be said to be a fraud to evade the statute? As to the first question, I say that this 25*l.* which is reserved by way of fine and income

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cannot be said to be any rent of the houses ; for according to *Lit-
leton* there are only three rents, namely, a rent-service, a rent-
charge, and a rent-seck ; and this fine and income cannot be said
to be any of those three rents, whence it follows that it is not a
rent, *et argumentum a divisione fortissimum*. 2. This fine and in-
come has none of the qualities and properties of a rent ; for 1. There
is no distress incident to it : 2. Upon an eviction of the house there
will be no discharge of this fine. 3. There will not be any appor-
tionment of this fine upon an eviction or grant of part of the house.
4. Upon an entry or feoffment over of the house there will not be
any extinguishment or suspension of the fine. 5. This fine or in-
come is not incident to the reversion, nor will it pass with it. 6. It
shall not be said to be a rent either in respect of the lessor, or in
respect of the lessee : for, in respect of the lessor, it is a *chose in
action* which cannot be granted over, and which will go to the exe-
cutor, and will not descend to the heir ; and in respect of the lessee,
it will not bind as a rent will do ; and for that reason, in the book
of 45 E. 3. 11. if a lease be made to baron and feme with such a
reservation of a fine as in the case at bar, it will not bind the feme,
notwithstanding that she agreed to the lease, as another rent would
do ; and 10 Eliz. Dy. 275. in the lord *Darcy's* case, it was resolved,
that where such a reservation was made as in the case at bar, the
king should not have the rent, nor could relief be given upon the
ground of fraud.

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As to what has been objected, that the fine in the case at bar
shall be said to be a rent for five reasons, 1st. from the etymology ;
2. from the common appellation ; 3. the judgement of the common
law ; 4. the judgement of the ecclesiastical law which is to be re-
garded in a case of tithes ; 5. from the intention of the decree ; I
answer, that as to the etymology, which is a *reddendo vel redeundo* in
which *omnis fructus* is comprehended, that it is not sufficient to
draw it within the general word of a rent ; but it must be a rent of
houses, according to the words of the decree and *Niger's* constitu-
tion, which call it *pensio domus*, and *Lindwood*, who calls it *pensio
quæ provenit ex domo* : and this fine and income cannot be said to
be a rent of a house, nor to be recoverable from it, because this
fine charges only the person, whereas a rent of a house charges the
house, and the person is only charged in respect of the house ; and
therefore, notwithstanding the house be burnt and consumed, or the
lease thereof utterly avoided, yet shall the lessee pay this fine, for
his person is bound in respect of the collateral covenant, and the
rent neither issues, nor is it rendered, out of the house. Then as
to the 2d. point, viz. common appellation, this is not a rent even in
that sense : for the *Londoners* take notice of this as a fine and in-
come, and call it so, and not a rent : but, admitting that this fine

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were a rent in common appellation, that is no argument to make it a rent within the interpretation of a statute, which requires a legal interpretation, and not a vulgar appellation, according to the case of 13 & 14 *Eliz. Dy.* 296. *b.* where it is adjudged, that a bastard shall not be a child advanced within the statute of 32 *H. 8. c. 1.* and yet according to 39 *E. 3.* he is a son in common appellation, for he is *filius naturæ*. And if a parson or other ecclesiastical person covenant that another shall enjoy his land for so many years; notwithstanding this is a lease in common appellation, yet it is not a lease within the statute of 13 *Eliz. c. 13.* so as to be avoided; for the statute of 14 *Eliz.* was made on purpose to avoid such sort of covenants. Besides, the statute of 37 *H. 8.* being penned by grave and learned men who are named in the statute and decree, it is not requisite that an interpretation be made according to vulgar appellation, they being sufficiently conusant what phrases to use. But, admitting that an interpretation were allowable of a rent according to common appellation, yet this fine is not a rent within the compass of the decree, because this manner of reservation by way of fine and income was not in use before the making of the decree and statute of 37 *H. 8.* and not being a rent in common appellation at that time, it cannot be drawn within the statute at this day, notwithstanding that it be now a rent in common appellation: and *Carter's* case, in 25 *Eliz.* does not make against this, because that statute was made on purpose to be applied to a vulgar appellation. As to the 3d. cause, *viz.* the judgement of the common law, notwithstanding that the lessor in his reservation of it calls it a rent where it is reserved out of a mill, out of an advowson, or out of goods, yet in judgement of law it is only an annual payment, and not a rent, and so the judgement of law is that it is not a rent, as

[324] we see by 1 *H. 6.* 9 *H. 6.* whatsoever the reservation of the party may be. It is to be observed too that 11 *H. 4.* & *F. N. B.* call it *annuus redditus*, and not by the name of *quatuor libratis redditus*, which is that by which a rent is demanded, as we see by the books before cited; and therefore the books which are produced to prove an annuity to be a rent in judgement of law, strongly prove the contrary. For 1. a rent is not demanded by the name of *annui redditus*, but of *quatuor libratarum redditus*: 2. The warrant of attorney in a writ of annuity is in a plea of *debt*; whereas in a precept for rent it is in a plea of *land*, according to 11 *H. 4.* which shews that *annuus redditus* and a rent are different. 3. It is not sufficient to prove it a rent in judgement of law, without proving it to be a rent out of a house; and of that nature this fine and income is not; because it is a *chose in action* which charges the person, like an annuity, and is not grantable over; and if an annuity be granted to pay out of a person's coffers, the grantee must resort to the person of the grantor to charge him in a writ of annuity, and cannot go to

the coffers to take the annuity out of them. As to the 4th point, viz. the judgement of the ecclesiastical law, it is not material in the case at bar what that may be; for a construction is not to be made in this case of canons of the church or any other part of ecclesiastical law, where their exposition and judgement are to be received, and credit is to be given to them; but an exposition is to be made of an act of parliament, which is part of the temporal law; and such exposition must be according to the temporal law, notwithstanding that it concerns ecclesiastical things. And for this reason it appears by 7 *Eliz. Dy.* 237. 8 *Eliz. Dy.* 255. 4 *Rep.* (a) *Holland's case*, that the statute of 21 *H.* 8. is expounded to make an avoidance without any declaratory sentence, according to the common law, notwithstanding it concerns an ecclesiastical person. The same exposition is also made of the statute of 13 *Eliz. c.* 12. for not reading the articles, as we may see by 23 *Eliz. Dy.* 377. & 30 *Eliz. Morris and Eaton's case*, and yet it concerns both an ecclesiastical thing, and an ecclesiastical person. It is to be observed too, that the act of parliament makes the lord mayor of *London* and the lord chancellor of *England* the expositors of this statute, for which reason an exposition is to be made according to the common law, and not according to the judgement of the ecclesiastical law; and prohibitions have been often granted where a libel has been exhibited in the ecclesiastical court for the tithes of rent of houses in *London*, as was done in the case of *Price and Watts*, 34 *Eliz. B.R. & M.* 5 *Ja.* in the case of *Scudamore and Bell*, in *C.B.* and in the case of *Dr. Prouse*, *Tr.* 15 *Ja.* which shews, that the judges of the ecclesiastical law are not judges in this case, but that judgement is to be given according to the rule of the common law. Here are no *Latin* words for the grammarians, nor civil law terms for the civilians to give their exposition of: but here is a plain *English* statute, of which a construction is to be made according to the rules of the common law. And it hath been often adjudged upon the statute of 31 *E.* 3. *c.* 11. which warrants the granting of administration of the goods of an intestate, that a lease for years is *bona* within that statute: and in 7 *H.* 4. 6. it is ruled upon the statute of 4 *E.* 3. *c.* 7. which gives trespass *de bonis asportatis in vitâ testatoris*, that executors may have an *ejectione firmæ* upon an ejectment in the life of the testator; and so they may have a ravishment of ward according to 11 *H.* 4. 55. As to the fifth point, viz. the intent of the decree, I insist, that this fine and income of 25*l.* *per ann.* is not a rent within the intent of the decree. For when an act of parliament speaks of a rent, it must be intended to be such a rent as is properly a rent; as, where an act of parliament makes mention of escuage, it is to be understood

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of that which is properly escuage, which is escuage uncertain. Besides, every rent is not within the compass of the decree; and therefore if the rent be not of a certain value, as, if the rent reserved be a spur or a horse, &c. without the addition of any value, it is not a rent within the statute, not being of any certain value. So, it must be a yearly rent; for which reason if it be a rent of that kind upon which an action of debt does not lie till the last day, as in *Walker's* case, 3 *Rep.* 22. & *F. N. B.* 130 *H.* and in the case at bar, it is not a rent within the intent of the decree. It appears by an examination of the several branches of the decree, that the rent which the decree has in contemplation, is such a rent as is properly a rent, and arises upon a reservation, and issues out of the houses: for the first of those clauses is, *where any lease, &c. shall be made of any house reserving less rent than hath been paid, &c.*: the second is, *where any person shall demise any dye-house or brew-house, or the like, reserving a rent, &c.*: the third clause is concerning the payment of tithes according to the rates of those several rents reserved; so that if there be not a rent reserved and issuing out of the houses, (and the fine and income in the case at bar is not such) then it is not within the intention of this decree. But farther, the decree has a clause for an abatement of the rent in case where the house is burnt; and this income is not within that clause, because it shall be paid notwithstanding any such casualty, and there is no need of any new reservation. And by a clause in the decree, assignees are chargeable according to a proportion with the rent, and there cannot be any apportionment of this fine and income, and therefore it is not within the intention of the decree. Nor is it the intention of this decree to take up the rack rent, for that is contrary to the intent of all the other acts, as 31 *H. 8. c. 12.* 37 *H. 8. c. 12.* 1 *E. 6. c. 14.* 13 *Eliz. c. 10.* which only aim at the reservation of the ancient rent; and if the makers of the decree had aimed at the value of the houses, they might have said a rate to be paid according to the value of the houses and not according to the reservation of the rent. And if tithes should be paid for this fine and income, there might be a payment beyond the value of the house; for the lessee is bound to pay this income whatever may become of the house; and therefore it is possible, that the house might be forfeited, or there might be an eviction, or a new lease might be granted of it; and then tithes would be paid for it according to this income, and also according to the proportion of rent newly reserved, which is contrary to the intention. It never could be the intention of the decree to oppress young tradesmen, and if the law should incline to this exposition, that tithes should be paid according to the proportion of this income, they would be oppressed; for either they must pay great sums immediately, which they are not able to do; or beyond their fines and incomes which they pay annually, they must pay an

eight part more for tithes, which would be exceedingly mischievous. Besides, it would be very inconvenient to force men to lease their houses at a rack rent, as suppose they should be tenants in tail, &c. for after they have once raised the rent, they cannot lower it when they will. And as to the objection, that this construction to pay tithes according to the proportion of income is *pro bono ecclesie*, and therefore is to be extended as far as it can be, I answer, in the first place, that it is observable, that this decree is made in enlargement and amplification of what was paid to the ministers before, and not by way of diminution; for whereas only 2s. 6d. was due before the decree, now by the decree it is at the rate of 2s. 9d. in the pound. 2. This rate of 2s. 9d. in the pound being more than is allowable either *jure divino*, by the common law, or by custom, (for those laws allow only a tenth part, whereas this is an eighth part), it is not reasonable to extend it farther than the words import. 3. There being an imposition of the payment of tithes upon several things, as dye-houses, brew-houses, stables, gardens, &c. upon which there was not any imposition before, it was consistent with reason only to give an allowance of payment of tithes according to the rate of what is properly a rent, and not according to the rate of the fine or income; and the more especially so, because the ancient constitution was that tithes should be paid at the rate *prout domus locabantur*, and not *prout locari poterunt*. 4. The decree imposes fine and imprisonment upon those who do not pay their tithes, and therefore it is to be *stricti juris*, as we see by Dr. Bonham's case in 8 Rep. 107.

As to the second question, which is, whether this reservation of 25l. *per ann.* by way of fine and income, be a fraud or not, I say, 1st. that it cannot be a fraud upon the rules of the common law, because the person against whom the fraud is supposed to be committed had no interest at all in the 25l. *per ann.*, in the reservation of which the fraud is supposed to consist. For there was only 25l. *per ann.* anciently reserved, and he who shall have remedy against fraud at common law, must have a precedent interest according to the cases of 22 Ass. pl. 72. 43 E. 3. 2. 48 E. 3. 12. 8 E. 2. Assise 396. 3 Rep. 83. *Upton and Bassett's case*; in all which cases there was a precedent interest in the person supposed to be defrauded; and for that reason he had remedy at the common law. But, if there were no such precedent interest, then there was not any remedy given; as, where a villein alienated his goods by fraud, the lord had no remedy for them, because his interest commenced only upon the claim or the seisure. And upon 17 E. 3. 54. and 3 E. 3. *Collusion* 29. where the tenant alienated by collusion, the lord had no remedy before the statute of *Marlbridge*; because he had no interest precedent to the alienation. And before the

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statute of 3 *Ja. c. 5.* if a recusant had purchased lands in the name of another person, the king had no remedy for those lands, because he had no precedent interest. So, in *Myght's* case, in 8 *Rep. (a)* where the father and son are joint purchasers of lands holden *in capite*, there is no remedy for the king. And I conceive that this reservation is not a fraud, nor material; inasmuch as the fraud, if it be a fraud, rests in non-feasance, *viz.* in the non-reservation of rent out of the house; and the common law extends only to a fraud which consists of a misfeasance, and not to one which consists of a non-feasance; and therefore where a usurpation was had upon an infant or feme-covert by fraud, there was no remedy before the statute of *West. 2. c. 5.* it being a fraud that consists of non-feasance. And the reservation of 25*l. per ann.* by way of fine and income, cannot be worse than it would be if there were no such reservation; and if only the 5*l. per ann.* had been reserved, without reserving the income, it had been well enough, because the ancient rent was reserved, and the law requires no more. I conceive that this can be no fraud upon the decree itself; for the decree only extends to cases where either no rent is reserved, or there is less than the ancient rent reserved; and there is no provision to compel the reservation of a greater rent. 2. The fraud and covin mentioned in the statute goes to the payment, and not to the reservation; and here being a payment of tithes according to the rent of 5*l. per ann.* which was the ancient rent, the statute will not extend to it. 3. Upon the decree itself, if *Burrell* had not made any reservation of rent at all, he would have paid only after the rate of 5*l. per ann.*; he shall not therefore be now in a worse plight than if he had not reserved any rent at all: which being so, it is a very strong argument that tithes should be paid only after the rate of 5*l. per ann.* and not according to the rate of the income, and the reservation of the income should not be said to be fraudulent, and to be made by fraud in order to evade the statute. As to what has been objected of the conveniency of having tithes paid according to the proportion of the income, I admit that the rule of justice is the rule of conveniency, and that what is just is convenient; and if the law be as I have argued it is, then, upon the rule of justice, tithes ought not to be paid after the rate of 30*l. per ann.* but only at the rate of 5*l. per ann.*: and the statute of 37 *H. 8. c. 12.* is as well a restriction upon the parsons that they shall not demand more than 2*s. 9d.* in the pound, as it is an obligation upon the citizens that they shall pay according to that proportion. And as to the argument which has been drawn from the divine right, that can be of no avail in the case at bar, because the 2*s. 9d.* in the pound, being more than the tenth part, is more than can be demanded by

the law of God. And as to the argument which has been drawn *a consensu civitatum et sapientum*, neither of those will warrant the opinion of the payment of tithes according to the rate of the fine and income, but the contrary. And as to the argument which has been drawn *a convenientia rei*, if we are to be determined by this, it could never be the intent to require a payment of a greater proportion than according to the ancient rent; for it would be inconvenient, 1st. to compel men to lease their houses at rack rents: 2dly. it would be a great imposition upon those beginners who are unable to give fines *in pecuniis numeratis*: 3dly. it would be a discouragement to laying out any money upon their houses, since their charge would be raised according to the money laid out: 4thly. it would be the disturbance of a settled opinion, which hath been holden time whereof the memory of man runneth not to the contrary: 5thly. the *London* benefices would be greater than many bishopricks in *England*. And in *M. 5 Ja. in C. B.* where *Scudamore* and *Eire* were plaintiffs in prohibition against *Bell* parson of *Queenhithe*, it was resolved, that there could be no suit in the ecclesiastical court for tithes of houses in *London*, because the statute had appointed other persons to be judges in that case. 2dly. It was agreed, that no tithes could be demanded of those houses which were built subsequent to the making of the decree, because the statute extends only to those houses which paid tithes before. 3dly. It was resolved, that a greater proportion could not be demanded of houses in *London* than according to the ancient reservation, and that no respect was to be had to fine and income. (a)

It was agreed by the lord chancellor and the other assistants, 1st. That the *25l. per ann.* reserved by way of fine and income, was not a rent. 2dly. It was ordered, that the records which had been cited, should be produced. For if the rate paid of ancient time was only *2s. 6d.* and so the decree went in amplification of the ancient proportion, then it was of some moment, *Niger's* constitution being *ex antiquâ consuetudine et tempore præscriptibili*. 3dly. The record in the *32 H. 6.* was a record made by the citizens themselves, and therefore not of so great authority. (b)

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2 Inst. 659.
Supra 228.

(a) In the case of *Meadhouse and Taylor, B.R. Hil. 5 Ja. Noy*, 130., it was holden in a prohibition to a suit in the spiritual court, for tithes of rent in *London*, that by *37 H. 8. c. 12.* the suit ought to be before the mayor of *London*, by complaint in writing, in nature of a *monstrans de droit*, declaring all the title. And if the suit be in the spiritual court, the court of *B. R.* may grant a prohibition, though it hath not power to meddle with them. 2dly. It was resolved, that a reservation by a lessee for life, who leases for years to *A.* is not sufficient to bind him in the reversion to pay

tithes according to that rate. 3dly. That a rent for half a year, and afterwards for another half year, is a yearly rent within the meaning of the decree. And note, as the same was last let, not intended last before the decree, but before the demand of the tithes.

(b) See the *Warden and Minor Canons of St. Paul v. Cricket*, 2 Ves. jun. 563. *infra*, 1425. *The Warden and Minor Canons of St. Paul v. The Dean*, 4 Pri. 65. *infra*, vol. ii. *Minor Canons of St. Paul v. Cricket*, 5 Pri. 14. *infra*, vol. ii.

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The statute of 4 H. 4. c. 12. does not affect a vicarage founded before the 1st of R. 2. and it was competent to the pope to dissolve such a vicarage, and re-annex it to the parsonage, notwithstanding that statute. Cro. Ja. 515. 2 Ro. Rep. 97. 137. Palm. 113. 219. 8. C.

Tr. 16 Ja. A. D. 1618. B. R.

Ward v. Britton. [MSS. Calthorpe.]

IN an action of trover and conversion for two lambs, brought by *Ward* against *Britton*, and not guilty pleaded, a special verdict was found; upon which the case appeared to be as follows.

The prior of *Daventre* being seised of the rectory of *Norton* in the county of *Northampton*, appropriated in *proprius usus*, and there being also a vicarage endowed with the altarage and small tithes, an ordinance was made in 30 H. 6. by pope *Nicholas*, (which purported in its recital to be made at the petition of the king), that thenceforth the parish church of *Norton* should not be governed by a perpetual vicar, but the cure should be served by the monks of the priory, or by a secular priest *ad nutum prioris, non obstantibus aliquibus statutis, provisionibus, et ordinationibus in contrarium, et licentiâ aliorum quorumcunque non requisitâ*. The prior of *Daventre*, by virtue of this ordinance, served the cure by his monks, or by secular priests, who were removeable at his pleasure, and received the profits of the vicarage until the passing of the act of 27 H. 8. when the priory was dissolved, and with all its possessions granted to *John* bishop of *Lincoln*, and *Thomas Audley* lord chancellor of *England*, to the use of the master and fellows of *Christ Church* college in *Oxford*. The lord *Cromwell* being vicar-general in ecclesiastical causes, united the church and chapel of *Norton* to *Christ Church* college, but without making mention of the vicarage, *ita quod* the college should have all the profits, &c. The king confirmed the union, *ita quod* the church should enjoy the church and chapel. The college served the cure by their priests and curates, allowing them a pension; and afterwards in 37 H. 8. the college surrendered the rectory and vicarage to the king, in whose hands they remained until 12 Ja. when he granted both to *Ward*, who took the tithes and all the profits, and only allowed a pension to one who served the cure. Some time after, *Britton* obtained a presentation from the king, and was admitted, instituted, and inducted to the vicarage, and being so inducted took the two lambs, as being parcel of the tithes wherewith the vicarage was endowed, upon which *Ward*, the patentee, brought this action.

Benedict Langden of the *Middle Temple* argued for the plaintiff.— I conceive, 1st. that by the instrument made by pope *Nicholas A. D.*

[331] 1451, there was a dissolution of the vicarage, so that there was no longer any vicarage at all, but only a parsonage as it was at first before any vicarage was endowed. 2dly. I conceive that the plaintiff has good right to the tithes by virtue of the instrument of dissolution, notwithstanding there may be some defects in it. As to the 1st point, the vicarage being a spiritual thing, and the endow-

ment of it a spiritual act, the pope had power to dissolve it. For notwithstanding he had no right to interfere in temporal things, yet he had full power in spiritual acts, as we see by 14 *H.* 6. 16. where he dispensed with a monk in his profession; 29 *E.* 3. 7. where an appropriation was made by him; and 10 *E.* 4. 30. where it is said, *quod papa omnia potest*. As to what may be objected, that the king's assent is requisite to this dissolution, because he may have an interest in the vicarage by lapse, which he will lose upon the dissolution; I answer, first, that the king's assent is not requisite. For by 40 *E.* 3. 28. and 31 *H.* 6. 14. it appears, that a vicarage endowed may be dissolved, and restored to the parsonage by reason of the poverty of the parsonage; and as the king's assent is not requisite for the endowment of it, so it is not required for its dissolution, for *eodem modo quo quid constituitur, eodem modo dissolvitur*; and by the same reason that the assent of the king should be requisite, the assent of the bishop should be requisite, for the bishop is in a nearer possibility of lapse than the king. 2dly, But there is the king's assent in this case; for it appears by the pope's ordinance, that it was made *at the petition of the king*, which demonstrates his assent, according to the *warden and commonalty of Sadler's case*, 4 *Rep.* 55. where it is holden, that a licence to marry a *nief* imports an enfranchisement. 3dly. Admitting the king's assent to be requisite, as it is in case of an appropriation according to 17 *E.* 3. 39. yet, if it were done without his assent, it would be well enough, according to the rule laid down in 5 *Rep.* 39. where it is said, *quod fieri non debuit, sed factum valet*. 4thly. The king's licence shall be here intended; for according to *Priddle and Napier's case*, in 11 *Rep.* it shall be intended that spiritual corporations have obtained what is available for them in law. And as to the objection that may be made, that this ordinance of the pope is against the statute of 4 *H.* 4. c. 12. which enacts, that *in every church appropriated a secular person be ordained perpetual vicar, canonically instituted and inducted in the same*; I say, that the statute of 4 *H.* 4. being only an affirmative law, will not take away the power of the common law according to 33 *H.* 8. *Dy.* 50. (a) which permits a restitution of the vicarage to the parsonage when the parsonage is impoverished; and so is 31 *H.* 6. 14. And this vicarage having been enjoyed 160 years after the execution of that instrument, without any presentation being made to it, there shall not be now any presentation to it, any more than an action will be allowed to be brought upon the statute of *Merton*, where it never has been brought. As to the second point, I say, that all the tithes belong *de jure* to the parson-

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(a) *Earl of Southampton's case*.

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age of *Norton*, and therefore as upon the death of all the monks the land will revert to the first founder, according to 21 *H.* 7. 4. and upon the death of the tenant in dower the land will revert to the heir without any express grant: so upon the death of the vicar, and continuance of the parsonage and vicarage together in one and the same hands, the tithes wherewith the vicarage was endowed will revert to the parson. And as to the objection that may be made, that this shall not be permitted, because it is mortmain, I answer, that the vicarage, being a spiritual thing, is not within the statute of mortmain, any more than tithes, obventions, oblations, &c. are, according to 21 *E.* 3. 5. 2dly. Admitting that the pope's instrument were insufficient to effect a dissolution of the vicarage, yet the prior of *Daventre* having the tithes of the vicarage *de facto* at the time of the dissolution, and in reputation, that is sufficient to give those tithes to the king according to the case of 9 & 10 *Eliz.* *Dy.* 267. (a) where a vicarage in reputation was given to the king by *st.* 1 *E.* 6. c. 14.; the 22 *Eliz.* *Dy.* 368. (b) where a chantry in reputation was given to the king; and 11 *Rep.* *Priddle and Napier's case*, where a reputative appropriation was given to the king; and it being in the king, the statute will supply all defects, and make that good, which was good only in reputation before, according to the case of *Bedle and Beard* (c), in 4 *Ja.* where it was adjudged, that the

(a) *Lanwybrevie College case.*

(b) *Dean and Chapter of Paul's case.*

(c) The case of *Bedle and Beard* was thus: In 31 *E.* 1. the king being seised of the manor of *Kimbolton*, to which the advowson of the church of *Kimbolton* was appendant, by his letters patent granted the manor with the appurtenances to *Humphrey de Bohun* earl of *Hereford* in tail general. *Humphrey de Bohun*, the issue in tail, by his deed in 40 *E.* 3. granted the advowson, the church being then full of an incumbent, to the prior of *Stonely* and his successors; who at the next avoidance held it in *proprios usus*; and upon this appropriation made, *concurrentibus iis quæ jure requiruntur*, the prior and his successors held the church appropriate until the dissolution of the monastery in 27 *H.* 8. The manor descended to *Edward* duke of *Buckingham*, as issue to the said *estate-tail*, and the reversion descended to king *Henry* 8. The duke in 13 *H.* 8. was attainted of high treason: in 14 *H.* 8. the king granted the manor, &c. with all advowsons appendant, &c. to *Richard Wingfield* and the heirs male of his body; in 16 *H.* 8. it was enacted, that the said duke should forfeit all manors, &c. advowsons, &c. which he had, &c. in 4 *H.* 8.: in 37 *H.* 8. the king granted and sold for money the rectory of *Kimbolton*, as impropriate, in fee; which by meane conveyances came to the plaintiff for 1200*l.* In 37 *Eliz.* *Beard*, the defendant, obtained a presentation from the queen by lapse, pretending that the church was not lawfully impropriate to the prior

of *Stonely*; 1st. because *Humphrey*, who granted it to the prior, had nothing in it; for that it did not pass to his ancestor by these words "*manerium cum pertinentibus*:" or 2d. because he had no more than an estate in tail, and then by his death his grant was void. But it was resolved by the lord *Ellesmere* lord chancellor, with the principal judges, and upon consideration of precedents, that the plaintiff should enjoy the rectory. For although that by any thing that can now be shewn, the impropriation is defective, (for by nothing that now appears, the issue in tail had any thing in the advowson at the time of his grant to the prior,) for that the advowson did not pass by those words, "*cum pertinentibus*;" yet it shall be now intended in respect of the ancient and continual possession, that there was a lawful grant by the king to the said *Humphrey*, the grantor in fee, so that he might lawfully grant it to the prior. *Omnia præsumuntur solemniter esse acta*; all shall be presumed to be done which might make the ancient impropriation good: for *tempus est edas rerum*, and records and letters patent, and other writings, either consume, or are lost or embazzled: and God forbid, that ancient grants and acts should be drawn in question, although they cannot be shewn, which at first were necessary to the perfection of the thing. And if the impropriation had been drawn in question in the lifetime of any of the parties to it, they might have shewn the truth of the matter: but, after the death of the parties, and after so many succession of ages, in

statute of 31 *H. 8.* cures the defect arising from the patron who assented to the appropriation being only tenant in tail; and 30 *Eliz. Grymes and Smith's* case, where an appropriation without any evidence of endowment of a vicar according to 4 *H. 4.* was saved by the statute.

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Wincoll of the *Middle Temple* argued for the defendant. — 1st. The tithes of lambs are within the compass of the endowment, and within the word *alteragium*; for so the civilians agree; and in a case between *Turnor* and *Andrews*, 2 *Eliz.* it was resolved that the word *alteragium* extends to the tithe of wool and lamb, and to all other small tithes and offerings; and *M. 13 Ja.* between *Britton* and *Cartwright* it was decreed accordingly in the exchequer, (which decree was produced and read in court). 2. It shall be intended, that until 30 *H. 6.* the vicarage was presentative, notwithstanding that it be not found who presented to it, for the endowment of a vicarage is a strong implication that it is presentative, and without more the parson himself shall be said to be patron, and shall present to it; because it is derived out of his parsonage, and cannot be made without his consent. But, if it were not presentative, the institution and induction could not give any title to the tithes; for, as presentation, institution, and induction to a church which is appropriated, will be void; so it will be of a vicarage, where it is not presentative. 3. The instrument of the pope being in nature of an appropriation of the vicarage to the prior and convent of *Daventre*, is of no avail in law; 1. because this vicarage being after the endowment a distinct thing from the parsonage; according to 11 *H. 6.* 19. & 32. cannot afterwards be appropriated to the parsonage; for the parson would by that means be his own vicar, which cannot be, a vicar *sustinens alterius personæ operam, tanquam fidem vicariam*; and the book of 44 *E. 3.* 28. does not oppugn this doctrine. 2. This appropriation and papal instrument is directly contrary to 4 *H. 4.* c. 12. for whereas that act directs that there shall be a vicar perpetual, instituted and inducted, and that he shall be a secular parson, this instrument crosses it in every point, and therefore cannot be of any avail, and those who are regulars and under any special rule, cannot be vicars by that statute. 3. To every appropriation the assent and licence of the king are requisite, and the act of the pope alone without the king's assent is not sufficient to make an appropriation, as we see by 11 *H. 4.* 6.

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all of which the church was esteemed and allowed to be rightfully inappropriate, if any objection or exception should now prevail; the ancient and long possession of the owners of the rectory would hurt them. For if those objections or exceptions

had been made in the lives of the parties, without any question they had been answered, otherwise in so many successions of ages it would have been impeached or impugned. 12 *Co. 4 b.*

1618. 18 *Eliz. Dy.* 344. (a) 46 *Ass. pl.* 4. *Pl.* 497. (b) *Grendon's case*, 29 *E. 3.* 2. 9. 10. & 50 *E. 3.* 26. where you will always find the king joined with the pope in the making of an appropriation; and by the statute of 38 *E. 3. c.* 1. to obtain a licence of appropriation from the pope without the king's licence, subjects the party to a premunire. And it appears from 10 *E. 3.* 6. that the king without the pope made an appropriation, though it was more usual to have the pope's confirmation. 4. The words of appropriation are wanting in this instrument; for in *Pl.* 494. it appears that the words of appropriation are, *appropriavit, consolidavit, univit, &c. habend', tenend', gaudend', et convertend', easdem rectoriam et ecclesiam, &c. in proprios usus absque aliquâ presentatione, nominatione, inductione, &c.* but there are no such words in this instrument, and therefore the appropriation cannot be good. And as to what has been objected, that this instrument amounts to a dissolution of the vicarage, which may be done by the pope without the king's assent, I deny that; for in 40 *E. 3.* 48. there was a restitution made of the vicarage by the ordinary. And as to what has been said, that this being a dissolution in reputation, the tithes shall be given to the king by the statute of 27 *H. 8.* and all defects and imperfections cured by that statute; I answer, that this being a thing done only by the pope

[335] without any good ground, it shall not be given to the king, nor will the statute supply the defects; any more than in the case of a college, 6 & 7 *E. 6. Dy.* 81. (c) which was founded by the pope; for there it was holden that it was not a college given to the king, because there was no good ground for its foundation.

Montague C. J. and *Dodderidge* seemed at first to think, that a vicarage being a thing derived out of the parsonage, and being endowed with part of the profits of the rectory, it might well be dissolved without the king's licence. For, as a vicarage may be endowed by the assent of the parson, patron, and ordinary, without the king, as we see in 40 *E. 3.* 28. so it may well enough be dissolved without the king. And by *Dodderidge*, if the vicarage become void during the time that the parsonage is void, and the parson present to the church, this presentation makes a dissolution of the vicarage in law. 2. They agreed that a vicarage might well enough be appropriated to any other than the parson; but they inclined to think that it could not well be appropriated to the parson, because the parson cannot be his own vicar. And *Montague* said, that though a parsonage could not be appropriated without the king's licence, the king being lord paramount; yet it should seem that a vicarage might well enough be so, because it is a spi-

(b) I find no case to this point of the date and page referred to. It should probably be read 7 & 8 *Eliz. Dy.* 244. *Montgomery's case.* Ed. (c) *Rex v. Lord Dacres.*

ritual thing, and derived out of the parsonage whereof the parson is patron.

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[In the next term the case was argued again by George Croke of the Middle Temple for the plaintiff, and Thomas Crewe of Gray's Inn for the defendant.]

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Croke. — I conceive that the instrument of pope Nicholas, A. D. 1451, was an effectual dissolution of the vicarage. For the pope, being the supreme ordinary, had the same power in spiritual things as any other inferior ordinary had; and an inferior ordinary might well dissolve a vicarage without the assent of the king or patron. For as the ordinary alone without the assent of the king or patron has power to endow a vicarage, it being a spiritual thing; so he has power alone to dissolve it, for *eodem modo quo quid constituitur, eodem modo dissolvitur*. In the 14 H. 8. the act of endowment and dissolution, being a spiritual act, is attributed to the ordinary alone. Pl. 497. Grendon's case, which makes mention of the first endowment of vicarages upon appropriations, gives this power to the ordinary. The 15 R. 2. c. 6. appoints the ordinary with the assent of the parson to allow a competency to the vicar. The 4 H. 4. c. 12. enacts, that no appropriation shall be good without an endowment of the vicarage by the ordinary. The 40 E. 3. 27. which discusses the question, is of opinion that an endowment of a vicarage by the ordinary with the assent of the parson, without the assent of the king or patron, is good; for the patron is not at any loss, and the endowment is only a meddling with the spirituality. And the vicar, who is a perpetual vicar upon such endowment, has such a freehold in him that he may maintain an assise or other action against the parson, though a temporary vicar cannot do so, because he has not the freehold in him according to 8 Ass. pl. 36. which agrees in the diversity, and 12 E. 3. 256. In the next place, there being an endowment of the vicarage by the ordinary alone, it must bind until it is avoided, admitting that it were not rightfully made: for it is a judicial act, and will bind until it be undone, according to the rule, *feri non debuit, sed factum valet*. And with this agrees 22 E. 4. 24. which saith, that this being a judgement special credit is to be given to it; and it is there put, that the vicar's freehold is subject to the charge of the ordinary. And Mowbray, 40 E. 3. saith, that though the land wherewith the vicar is endowed out of the parsonage shall, upon the dissolution of the vicarage, revert to the ordinary; yet land given to a vicar and his successors by another person, shall not do so. 20 E. 3. Annuities 32. where the parson had only an annuity of 5*l.* allowed to him, and the vicar was endowed by the ordinary, with the assent of the parson, with glebe, tithes, and offerings, it was admitted to be well enough. So by 16 E. 3. Annuities 24, and

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1681. *F. N. B.* 152. if there was an annuity only allowed to the vicar,

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that the endowment of the vicar is in ease of the parson. 3. The law takes notice of the pope as supreme ordinary, and therefore, by 29 *E. 3.* 14. though the pope without the king cannot make an appropriation, yet he may well supply the place of the ordinary in the making of one. And by 11 *H. 4.* 36. the power given by the pope to hold a benefice with a bishoprick was good enough *quoad* the ordinary, though it was not so *quoad* the king; and therewith agrees 17 *E. 3.* 39. And *Pl.* 497. *Grendon's case*, acknowledges such power to be in the pope as the ordinary had: and 25 *H. 8.* c. 19. allows the pope to have power in spiritual things; and in 19 *E. 3.* *Jurisdiction* 20. where one prescribed to have an annuity out of tithes, it was holden, that tithes being spiritual things, the annuity was spiritual, and debt would not lie for it at common law: and there it was also holden, that a bishop might prescribe to have the first fruits of every benefice. 4. There being a dissolution of the vicarage, that which is allotted to it upon the endowment is also taken away from it, according to the rule, *quando aliquis concedit aliquid, concedere videtur et id sine quo res ipsa esse non potest.* 5. This vicarage was a vicarage dissolved in reputation, because the abbot had constantly, from the year 1451, taken the profits of it; because there was not any presentation to it from that time; because it was generally considered as dissolved. And in spiritual acts the law supplies all defects, and intends them to be legally done, according to the case in 2 *Rep.* 47. where a lawful discharge of tithes is intended; and 5 *H. 7.* and 11 *H. 7.* a lawful union was intended under the general allegation of *concurrentibus iis quæ in jure requiruntur.* This then being a reputative dissolution of the vicarage, and the prior holding it at the time of the dissolution of the monastery, the statute of 27 *H. 8.* c. 20. will lay its hand upon it, and vest it in the same manner in the king as it was in the prior, according to the cases put in 11 *Rep.* 8. *Priddle* and *Napier's case*, where a reputative appropriation is given to the king by the statute of 31 *H. 8.* c. 13. and is unavoidable, the act of parliament having supplied the defects.

Crewe e contra. — I conceive in the first place that though a vicarage may be increased or diminished, yet being endowed at the time of passing the act of 4 *H. 4.* c. 12. it cannot be utterly dissolved. For the statute of 4 *H. 4.* supplies the defects of the statute of 15 *R. 2.* which only provides for the allowance of a competency to the vicar. It enacts 1. that the vicars shall be perpetual: 2. It extends to future as well as past appropriations. 3. Religious men shall not be vicars; and so, by consequence, there cannot be a dissolution of the vicarage, because it is not possible that the vicars

should be perpetual, and yet there should be a dissolution. And this statute being in the negative controls all acts done contrary to it, according to the case of 3 & 4 *Mar. Dy.* 135. where it is resolved, that by reason of the negative words in the statute of 5 & 6 *E.* 6. the sessions could not be holden at any other place than *Beaumaris*; and 33 *H.* 8. *Dy.* 50. (a) a grant under the great seal was thought not to be good, the statute of 27 *H.* 8. c. 8. requiring it to be under the seal of the court of augmentations: and therefore in the case at bar the pope had no power to make a dissolution [338] contrary to the negative words in the statute of 4 *H.* 4. And besides, it appears by 16 *E.* 3. *Monstrans de Faits* 166. that the ordinary, parson, and patron, should join in the endowment of a vicarage. And it is to be observed of the cases cited on the other side, particularly of *Priddle and Napier's case*, that the appropriation there was not an appropriation in judgement of law, but only a reputative appropriation. 2. Admitting that a vicarage could be dissolved after the statute of 4 *H.* 4. yet the pope had no power to do it, for it concerns the temporal possessions of men over which the pope never had any power; and therefore it appears by 9 *Rep.* 32. *The case of the abbot of Strata Marcella*, that the pope had no power by his constitutions to restrain the trial by the *ordeal*, and that an act of parliament was made in order to take it away. The 25 *E.* 3. c. 6. declares the pope to be a usurper upon benefices and seignories; 30 *Ass. pl.* 19. it is of no avail to plead the excommunication of the pope; and by *F. N. B.* 64, 65. a *significavit* could not be granted upon a certificate of excommunication by the pope; and *F. N. B.* 44. a prohibition was granted where the pope sent a citation for a man; 11 *H.* 4. by *Hanckford*, the pope's bulls are of no avail to dispense with the temporal law. By 25 or 21 *H.* 8. c. 13. the pope's bulls were adjudged to be contrary to the law of the realm. The 16 *R.* 2. adjudges acts done by the pope here in *England* to be done by usurpation; the 7 *H.* 4. c. 6. subjects any one to a *premunire* who may trouble a vicar with the pope's bulls; and the 29 *E.* 3. 7. rules that an appropriation cannot be made by the pope. And although during the time that Christendom was under the *Roman* yoke, a great power was attributed to the pope in temporals in regard of his eminency; yet when *England* and other parts of Christendom shook off that yoke, and became independent states, they would not allow him the great power which he had before: wherefore in the case at bar, the possessions of the vicarage being temporal, and the vicarage being made perpetual by 4 *H.* 4. c. 12. the pope cannot with the horns of his bulls put away this vicarage

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(a) This case does not apply; the statute not having any negative words, and the general opinion inclining to the contrary.

1618. against the act of parliament. 3. Admitting the pope had the power to dissolve the vicarage, yet the words being only *quod vicario decedente, vicaria regatur et gubernetur per priorem*, and that he shall appoint his monks or a secular priest, who shall be removeable *ad nutum prioris*, to serve the cure, &c. are not sufficient words of dissolution, but are only a personal provision and indulgence for the abbot and his successors during the time that the vicarage was in his hands, so that when the vicarage came into the king's hands, this personal provision was of no avail. *Quod fuit concessum* by Montague C. J. and Dodderidge J. for as it is said in *Sutton's case*, 10 Rep. (a) that there are certain words requisite for the creation of a corporation or an officer; so there ought to be apt words of dissolution. 4. Admitting the pope had power to dissolve the vicarage, and that here were apt words of dissolution; yet I conceive that the king's letters patent do not give any title to the plaintiff to take these lands or any other profits of the dissolved vicarage: for the vicarage being given to the king, as the prior had it, he must make an appointment of the vicar and of the profits of the vicarage, as the prior did, which he has not done in the case at bar: and therefore the plaintiff cannot have any title, and the letters patent shall not be construed to a strained intent. And for this reason it was ruled in (b) *Sir George Shirley's case*, that by the grant of *rectoriam* nothing passed from the king where an abbot had the presentation, and another person had the nomination, and the presentation came to the king by the statute of 31 H. 8.
- [340] And *M. 30 & 31 Eliz. Rot. 458. Denny and Esteate's case*, it was ruled, that by the grant of *vicariam* the advowson did not pass;

(a) 10 Rep. 1. *Case of Sutton's Hospital.*

(b) The case here alluded to is reported by Moore, 894. as of this very term, under the name of *Sir George Shirley v. Underhill and Burfey*; and his report is as follows. A *quare impedit* was brought in C. B. by sir George Shirley, baronet, against Underhill and Burfey; and the plaintiff declared, that he was seised of the manor of *Nether-Eptington* in the county of *Warwick*, and of the advowson of the vicarage as appendant thereto. The defendant made title to the advowson as appendant to the impropriate rectory of *Nether-Eptington*, and deduced title to the crown by the dissolution of the abbey of *Kenilworth*, and thence to queen *Elizabeth*, and pleaded the queen's grant of the rectory and advowson of the vicarage; *absque hoc* that the advowson of the vicarage was appendant to the manor: which issue was tried at bar. And upon the evidence the court directed that the advowson of the vicarage is of common right appendant to the rectory; but that it might be appendant to the manor; as, if the rectory were before the appropriation appendant to the manor, the advowson of the vicarage might upon the appropriation well be reserved

to the patron, and so will become appendant as the advowson of the rectory was. And though the instrument of appropriation be not extant, yet immemorial usage in the presentation is sufficient evidence of the appendancy. The case upon the evidence appeared to be thus: *Shirley* had the nomination, and the abbot the presentation: and the whole court was of opinion, and so directed the jury, that the nomination was the substance of the advowson, and the presentation was but as a ministerial interest: and if the presenter present without nomination, a *quare impedit* lies: so, if the nominator present *immediate* without presentation, a *quare impedit* lies against the nominator. 24 E. 3. 77. *Quare impedit* 26 & 27. 16 E. 3. *Quare impedit* 166. 1 R. 3. *Quare impedit* 102. 32 H. 8. Dy. 48. 3 *Eliz. Dy.* 190. *F.N.B. Quare impedit.* But the doubt upon the evidence was, whether, as the issue is general upon the appendancy of the advowson of the vicarage, and the evidence purports the nomination only to be appendant, the evidence maintains the issue. And thereupon a special verdict was found.

and yet in the case of a common person it would have passed well enough, according to 17 *E. 2. Grant* 57. And by 9 *H. 6. 20.* by the king's grant of lands of a person outlawed in trespass, the lands will not pass, because he has only the profits. And by 18 *H. 8 Br. Patent* 104. where a grant was made by the king to *J. S. et hæredibus masculis suis*, it was ruled, that the grant was void, because the construction was doubtful; and by 12 *Ass. pl. 35.* by the king's grant of consuance of pleas, the grantee shall not have consuance in an assize. Since then in the case at bar the king's grant may well take its effect in passing the appropriation, those words which are appointed to the vicar will not pass it without special words.

Montague and *Dodderidge* said, that it was clear that a vicarage might be dissolved after the statute of 4 *H. 4.* as in the case of 11 *H. 6. 22.* where the parsonage and vicarage being both void, the patron presented to the church generally, this was a dissolution of the vicarage. And *Dodderidge* was of opinion that a vicarage might well be dissolved by the parson and ordinary; for the parson *de communi jure* is patron, though by a composition the patron of the church may be patron of the vicarage, and present to it; and the statute of 4. *H. 4.* makes provision only in case where a vicarage is constituted, and does not restrain the dissolution of a vicarage, but that that may well enough be.

[In the following term *Hill. 16 Ja.* the case was argued again by *Davenport* for the plaintiff, and *Noy* for the defendant.

Our reporter was not present when *Davenport* delivered his argument, and therefore has given no more than the outlines of it; from which it should seem that *Davenport* took nearly the same course with the counsel who had preceded him on the part of the plaintiff. There is a short account of his argument in *Palm. 113.* but it does not appear to be worth the transcribing, and it is doubtful whether the reporter has not confounded it with *Mr. Noy's* argument.]

Noy. — I deny that vicarages are of ecclesiastical consuance, or that the pope had any jurisdiction over them. In *Hoveden* 459. you will find a charter granted by the archbishop of *York* by the command of the pope, and confirmed by *William the Conqueror*, unto *St. Cuthbert et omnibus ejus episcopis successoris et omnibus monachis ibidem in posterum futuris, ut omnes ecclesias, &c. in manu sua teneant et quiete eas possideant, et vicarios suos in eis liberè ponant qui mihi et successoribus meis de curâ tantum intendant animarum, ipsis vero de omnibus cæteris elemosynis et beneficiis. Concedo insuper, confirmo et præcipio, ut tam ipsi, quam ipsorum vicarii liberi et quieti in perpetuum sint ab omni redditu synodali, &c.* This charter I conceive to be a dispensation *et laxatio juris vinculi*, and not a declaration of the law. For if they could of right have vicars, there was no need of any dispensation. It also appears by *Hoveden*, in the beginning of

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king's *John's* reign, that there was a constitution made that vicars should not be negligent in their cure; and by the constitutions of *Otho*, which were made in 20 *H. 3* (a) you will find that there were vicarages at that time; for otherwise to what purpose should there be a constitution *De institutione vicariorum*. In *Oxfordshire* there are four vicarages (b) which were prior to those constitutions, for they are not subject to those ordinances: and by the decretals in the book *De officio vicarii*, tit. 18. it appears that it was usual for the succeeding parson to turn out the vicar that was put in by his predecessor; and an ordinance is made to prevent that, declaring that the presentation of one to a vicarage shall make him perpetual vicar. As to the objection which has been made, that the statute of *West. 2. c. 5.* gives a *quare impedit* for a vicarage, and therefore it was of ecclesiastical consueance at common law, I answer, that that is no argument at all. For the same reason might be given as to prebends, hospitals, &c. and it is clear that a *quare impedit* lay for them at common law, and the statute of *West. 2.* was merely declaratory of the common law as to them; and therefore by 16 *E. 3. Brief 660.* it is holden that a chapel was of lay jurisdiction, and a *quare impedit* lay for it before that statute (c), with which agrees 14 *H. 3. quare impedit 183.* And by 2 *H. 3. Graunt 89.* it appears, that a fine was levied of an advowson of a parsonage excepting the advowson of the vicarage; which shews that vicarages were prior to that time. And although they were not in the beginning of any account, (for they were but temporary,) yet since the law has fixed and settled them, notice must now be taken of them according to their establishment. 2. I conceive that the vicarage and parsonage in the case at bar are two several ecclesiastical benefices, though the prior of *Daventre* who was the parson, was also the patron; and being two several ecclesiastical benefices, there could not be so good a coalition of them, as there might be, if they had been as one benefice; and therefore if all the tithes of a parish, except only of 40 acres, be appropriated, there must be a new appropriation of the tithes of those 40 acres, otherwise they will not belong to the other appropriation; and if the parsonage, where a vicarage is endowed, be appropriated, by this appropriation of the parsonage the vicarage is not appropriated also; for they are two several ecclesiastical benefices, for which reason there must be a farther appropriation. And that they are two several ecclesiastical benefices is manifest from the opi-

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(a) *Wilkins* places them in 22 *H. 3.* See his councils.

(b) These four vicarages, it appears from Serj. *Turnor's* report of this case, were in the parish of *Bampton*. But from the *Liber Regis* it should seem that there are now but three vicarages or curacies.

(c) This point was not determined in 16 *E. 3.* for the chapel there was one of the king's free chapels, and as such exempt from the jurisdiction of the ordinary: but the 14 *H. 3.* is directly in support of it.

nion of *Fortescue*, 31 *H.* 6. 13. that the value of the vicarage and of the parsonage is to be reckoned as several values. And if a writ of right of advowson be brought for the parsonage, and a recovery be had, such recovery will not be a recovery of the vicarage; with which agree 17 *E.* 3. 76. & 5 *E.* 2. *quare impedit* 165.; and by *F. N. B.* 45. two several *indicavits* must be sued out for the parsonage and the vicarage. 3. I conceive that this bull of the pope in the case at bar will not amount to an appropriation of the vicarage to the prior of *Daventre*. 1. In regard of the person who made the instrument or bull; 2. In regard of the person to whom the appropriation was to be made. As to the first, the pope being the person who made the instrument, it is of no avail to constitute an appropriation: for though it concerns such things as are not *merè temporalia*, but are *in ordine ad spiritualia*, inasmuch as they tend to the maintenance of a minister; yet, there being a prejudice redounding to the king, who is supreme patron of all benefices, and is entitled, as such, to the benefit of lapse, according to the book of 17 *E.* 3. 64. where the king's title to present by lapse is called a presentation and not a collation, the pope could not of himself make an appropriation; and if he did, the king might seize it, until a fine were paid to him for the contempt, though he could not seize it by title of mortmain according to 21 *E.* 3. 6. And as to the book of 2 *E.* 3. 23. where an appropriation was made by the pope with the assent of the patron, that appropriation must be taken to be before the council of *Lateran*, when it was lawful for the patron to give his tithes to whom he would, and the joining of the pope was as nothing. In 18 *E.* 1. where *William Mountgeale* was divorced from his first wife by the bishop of *Worcester*, and after his death an appeal from the sentence was promoted; it was resolved, that no appeal should be permitted, because, if power should be given to the bishop of *Rome* to examine the validity of divorces after the death of the parties, he would draw into question the inheritances of men, with which it is not competent to him to meddle. And in 13 *E.* 2. among the records remaining in the office of the Remembrancer of the Exchequer, it appears, that the king is patron of all benefices, and therefore suit must be made for restitution of the temporalities to him, and not to the pope, who has no power over the temporalities. And *Rigandus*, who was bishop of *Winchester*, and chaplain to the pope, was of opinion, that the pope had no right to meddle with those things which are *in ordine ad spiritualia*. And as to what has been objected, that the pope had power to dissolve a vicarage, though he had not power to make an appropriation, I deny that he had any such power: for a vicar being a temporal corporation, he could not have power to dissolve it. In *Walsingham*, *fo.* 99. it appears by the pope's bull, that though he had dissolved

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the order of Templars *plenitudine potestatis sue*, yet *de jure* he could not do it; and you will see that the king, upon that bull being sent to him, made a protestation, which you will find in the exchequer, that he would not do that which was any ways inconvenient to the kingdom; and thereupon, notwithstanding the pope's bull was issued in 5 E. 2. yet the order was not dissolved here until the 17 E. 2. at which time it was done by act of parliament. It appears by 7 E. 3. 4. that it was not very well known at that time what an advowson was; and thereupon it was holden, that by the grant of the church the advowson passed. And as to the books of 40 E. 3. 28. 31 H. 6. 9 E. 4. 22 E. 4. which have been cited to shew that a vicarage may upon occasion be either increased or diminished by the ordinary, I agree that those books are good law; for it is manifest that they intend, where both the parsonage and the vicarage are presentative, and there is no loss at all either to the patron or to the king: for what he loses in the parsonage, he gains in the vicarage; or what he loses in the vicarage, he gains in the value of the parsonage; and so there being no prejudice at all either to the king or the patron, the law may well tolerate an increase or diminution of the vicarage. But in the case at bar it is to be observed, that the parsonage being an appropriation, if there should be a dissolution or diminution of the vicarage, the king would sustain a loss, because there is not any expectancy of presentation for the king to the parsonage: and so also when the vicarage is dissolved in the parsonage, the interest and benefit which the king might have by lapse is entirely gone: for which reason it is, that more is requisite to a dissolution of a vicarage in such a case as the present, than there is to the dissolution of a vicarage where the parsonage is presentative. In *Tr. 37 Eliz. Rot. 344. B. R. Austin and Twine's case (a)*, notwithstanding it was resolved there, that a union might be made of two churches by the patron and ordinary without the king's assent; because the king had the same benefit after the union as he had before it; yet a union could not be made to a church which was appropriated to a dean and chapter or college without the king's assent, and this in regard of the loss that might ensue to the king in the advantage of his title to collate by lapse; for in 8 R. 2. *Graunt* 104. it appears that a union of two chapels to the bishoprick of *Coventry and Litchfield* by the pope without the king's assent was not good: and 6 H. 7. 13. where a union was pleaded of a church to *Magdalen* college in *Oxford*, a *profert* was made of the king's licence by letters patent; which is an argument that it could not be made without the king's licence; and 50 E. 3. 26. where a prebend was

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changed into a treasuryship, the king's confirmation was pleaded. 1618.
 The vicarage therefore in the case at bar being presentative and
 secular, it could not be dissolved and made parcel of the regular
 possessions of the prior of *Daventre* by the pope without the king,
 who would lose by it the advantage which the law gives him of
 collating by lapse. 4. I hold that it is apparent from this instru-
 ment or bull, that there never was any intent in the pope to make
 an utter dissolution of the vicarage; but his intent was, that
 whereas *before* the vicar was perpetual and presentative, and took
 the profits to his own use, he should *now* be only donative and
 temporary, and should receive and collect the profits to the use of
 the prior and convent of *Daventre*; for the instrument has not a
 word of dissolution, but it has only words which empower the
 prior of *Daventre* to appoint one of his monks or a secular per-
 son to be the vicar, *ad nutum prioris instituendum et removendum*;
 and this does not dissolve the vicarage, though it changes the
 estate; and notwithstanding such change, he who is appointed
 vicar has *titulum et curam animarum*, and may bring an action against
 any one but the prior himself to recover the profits of the vicarage,
 as it appears by 2 *H.* 4. 24. & 12 *H.* 4. 17. where in the case of
 a vicar dative and removable it is holden, that he may maintain an
 action against any one except only his head and governor; and in
 33 *E.* 3. *Ayd de roy*, 130, it is holden, that the patron of a donative
 church shall take the profits to himself in the time of vacation; and
 yet by 6 *H.* 7. 14. if a stranger had taken the profits from him no
 action would have been maintainable against him. And that a
 vicarage or other ecclesiastical living may well be at will or upon
 condition is manifest from *Gregorius* in the 15th book, where it is
 said, that there are two manner of vicars; the one is *vicarius titu-*
latus qui habet curam animarum; the other is *vicarius conductitius et*
mercenarius qui est sine titulo. *Et vicarius titulus vel est perpetuus,*
vel in tempus et sub conditione. And by 17 *E.* 3. 42. it appears, that if
 the king granted a donative deanery to one, the patentee had only
 an estate at will. 5thly. I hold, that after the statute of 4 *H.* 4.
 c. 12. there could not be any dissolution of a vicarage; for that
 statute says, that *all vicarages united, annexed, or appropriated, &c.*
how well soever they, &c. by virtue of such licences may any ways be in
possession of the same in any time to come, they shall be also utterly void,
revoked, repealed, adnullled, and disappropried for ever; and therefore
 the instrument or bull in the case at bar purporting only to be a
 licence to the prior of *Daventre* to hold possession of the vicarage
 is merely void. And though there be the word *such* in the statute,
 yet that is to be intended of licences that were *such* in mischief and
 inconvenience; and it is not material though they should not be
such in time; for the statute was directed to the mischief and incon-

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Cur. Vide 17 E. 3. 51. Fish. Grant, pl. 57. : *Montague C. J. Croke and Dodderidge J.* thought that vicarages began to be in use when appropriations began; for when the corporation could not serve the cure by themselves, they substituted a vicar. And vicarages could not well begin before the division of parishes, and before certain pastors were appointed to each church. And though vicars had not at first any certain estate, so that they could maintain an *assise, juris utrum*, or other such actions, for that they had only a temporary interest, and no absolute disposition of the profits; yet continuance of time made them perpetual, and enabled them to bring actions against strangers and against the very

persons themselves who were their patrons, as we see by 40 E. 3. 28. & 14 E. 3. c. 17. 2. They resolved, that a vicarage might well enough be dissolved after the statute of 4 H. 4. for that statute extends only to the case where an appropriation is made, and no vicar is endowed, or where a religious man is made vicar; and it does not extend to prevent the dissolution of a vicarage. 3dly. They seemed to incline to be of opinion with *Davenport* upon all the points, except the instrument and bull of the pope, upon which they were in some doubt, whether it would amount to a dissolution of the vicarage in respect of the person who made it, and also whether in respect of the words it would amount to a dissolution, or to a temporary provision.

In *Mich. 17 Ja.* the case was argued again by *Bridgeman* for the plaintiff, who spoke only on two points: the first was, whether the statute of 15 R. 2. c. 6. or the statute of 4 H. 4. c. 12. restrained the pope from dissolving the vicarage: the second was, whether the instrument in question was sufficient to dissolve it. As to the first point, the words of the statute of 15 R. 2. being that *in every licence from henceforth to be made in the chancery of appropriation of any parish church, it shall be expressly contained and comprized, that the diocesan of the place, upon the appropriation of such church, shall ordain according unto the value of such churches a convenient sum of money, to be paid and distributed yearly, of the fruits and profits of the same churches, by those that shall have the said churches in proper use and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed;* it appears that this statute, by reason of the word *henceforth*, extends only to appropriations thereafter to be made, and not to those already made; and though it provides that in every licence of appropriation, care shall be taken that the vicar be sufficiently endowed, so that he may intend the cure of souls, according to the constitution of *Othobon*, made in 32 H. 3. and in the year of our Saviour 1248, which wills, that if a competent portion be not assigned to the vicars for the maintenance of their cure, the diocesan shall supply it; and also that hospitality be used for the relief of the poor; yet, if there were no such provision made in the licence, the appropriation was good enough, and was not annulled by the statute. For the statute was only a precept to the officers who made out the licences to make them in such manner, and it was a contempt in them, if they made them in any other manner; but it did not make the licences void, according to 5 E. 3. 43. where it is holden, that a licence of safe-conduct without naming the master of the ship, and mentioning the exact number of mariners, is well enough; for the statute of 15 H. 6. c. 3. is rather a precept how the officers shall make out the licence of safe-

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conduct, than vacates it, if it be not made in that very form. So, 33 H. 8. Dy. 50. the letters patent under the great seal were holden to be good enough, notwithstanding the statute directs that they be under the seal of the court of augmentations; for it is rather directory, than in avoidance of the letters patent. But this being a great defect in the statute of R. 2. the statute of 4 H. 4. c. 12. was passed to supply it; the first branch of which enacts, *that if any church be appropriated by licence of the said king Richard, or of our sovereign lord that now is since the said fifteenth year, against the form of the statute of 15 R. 2. the same shall be duly reformed according to the effect of the same statute, betwixt that and the feast of Easter next coming. And if such reformation be not made within the time aforesaid, that the appropriation thereof made be void and utterly repealed and adnulled for ever, except the church of Haddenham; so that it appears that this branch of the statute tends to the annulling of such appropriations as were made after the 15 R. 2. in which the form prescribed by that statute was not observed, and does not extend to any time prior to that statute. And as to the second branch of the statute which ordains, that the vicarages united, annexed, or appropriated, and the licences thereof had after the first year of the said king Richard, how well soever that they who have united, annexed, or appropriated such vicarages, be in possession of the same vicarages, or by virtue of such licences may in anywise be in possession of the same in any time to come, they shall be utterly void, repealed, and adnulled; it appears, that this branch extends only to appropriations made after the first of R. 2. and not to appropriations made before. And as to the third branch, which enacts, that henceforth in every church so appropriated a secular person be ordained vicar perpetual, canonically institute and induct in the same, and convenably endowed by the discretion of the ordinary to do divine service, and to inform the people, and to keep hospitality there, except the church of Haddenham aforesaid; and that no religious person be in anywise made vicar of the said church so appropriated, or to be appropriated by any means in time to come; it appears, that the first part of this branch of the statute extends only to appropriations made after the statute of 15 R. 2. by reason of the word "henceforth;" and the last part of the branch shall be expounded in the same manner by reason of the copulative "and," which couples both the sentences together, and shall make them agree in point of time; according to the book of 5 H. 7. 17. (a) where it is holden, that the count in trespass being *quare sic idem* such a day, year, place, *fregit, et eandem cepit et asportavit*, the copulative "*et*" made the caption and asportation to be at the same time and*

(a) Qu. Whether this reference be correct, as no such point appears to have been shewed.

place as the breaking was. 2dly. It is manifest, that the makers of the statute were not forgetful of the time to which they willed the statute to extend, because the words "*appropried or to be appropriated,*" intend that such churches as were appropriated from the 1 R. 2. until the making of the statute, and all other churches to be appropriated in future, should be comprehended within the statute. 3dly. The exception of the church of *Haddenham*, which was appropriated in the time of H. 4. is strong proof that it was not the intent and meaning of the statute to extend to appropriations made before the time of R. 2. 4thly. The making of religious persons vicars being in no wise contrary to law, it cannot be intended that such estates as were settled a long time before the act of parliament, should be unsettled by a retrospect to a precedent time. And as to what has been objected out of *Poulter's case*, in 11 Rep. 33. it makes for me: for *sic appellati* refers to such only as are appealed of malice, so that if they were not appealed of malice, and there was an indictment precedent, the appellees would not recover damages upon the statute of West. 2. c. 12. as we may see in 40 E. 3. 42. and 33 H. 6. 2. And it was now lately adjudged in *John Webbe's case*, upon the statute of 28 Eliz. that the words "*so proclaimed,*" in the statute, must mean according to the form of the proclamations there declared. And the statute of 21 H. 8. c. 15. for the falsifying of recoveries, hath, by reason of the words "*from henceforth,*" been always interpreted of recoveries after the statute. In the statute of 34 & 35 H. 8. c. 26. there is a special provision inserted for grants made by the king before the statute as well as after it, and a clause after the word "*such*" is intended of the grants before mentioned; as appears by *Wiseman's case*, 2 Rep. 15. In the case at bar, therefore, the words "*so appropriated,*" must be understood of such appropriations as are made after 1 R. 2. for those only are mentioned before, and they shall not be intended of those that were made at any time. 5thly. The last part of this branch of the statute, which is, that *no religious person be in anywise made vicar, &c.* was introduced merely to corroborate the first part of the statute, because otherwise the persons to whom the appropriations were made, would have put in one of their own monks or brethren, who would have done nothing but for the benefit of the house; and by that means the statute would have been frustrated. For according to 14 H. 4. 16. and 3 H. 6. 23. a religious man might well be a vicar; and therefore to prevent that was this last part of this branch of the statute inserted. 6thly. The statute of 4 H. 4. extends only to unions and appropriations, and not to dissolutions; the case at bar therefore being concerning the validity of a dissolution, and not concerning a union, the statute will not extend to it. And it appears by 31 H. 6. 14. and 20 E. 4. 6.

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1618: that if a rectory be impoverished, the vicarage may be dissolved :
 which shews that the dissolution of a vicarage is not within the
 statute of 4 H. 4.

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As to the second point, that is, whether this instrument of the pope be sufficient to effect a dissolution of the vicarage, I insist that it is sufficient. For the vicar being a person who is appointed by the ordinary to serve the cure in the room of the rector, and having a certain portion allotted to him by the ordinary for his service in the cure, the institution of the vicar and his endowment are of ecclesiastical consueance; and therefore also ecclesiastical persons, as they institute, so they may dissolve him, according to the books of 40 E. 3. 28. 22 E. 4. 24. and 14 H. 6. 16. and if the function of the vicar in the cure may be taken away by ecclesiastical power, the benefit which is incident to that function may also be taken away by the same power; according to the cases of 7 E. 4. 12. and 35 H. 6. 57. where it is holden, that if the abbot and his monks all die, whereby there is a dissolution of the corporation, then will there be also an escheat of their possessions: and by 3 E. 3. 57. 21 H. 7. 4. and *Pl. Grendon's case*, if an abbey be dissolved, the appropriation will also be dissolved. And if the spirituality may exist without the temporality, according to the opinion of *Stouffe*, in 10 E. 3. 1. where it is holden, that a bishop is a bishop notwithstanding he has not had the temporalities restored to him, and 15 Ass. pl. 8. where one was holden to be a prebendary, notwithstanding the manor was evicted that was parcel of his prebend; and 12 & 13 El. Dy. 294. where it is holden, that the spirituality of a prebend continues, notwithstanding all its possessions be granted away, and the case of the dean and chapter of *Norwich*, 3 Rep. 75. yet will not the temporality consist without the spirituality, and if there be a dissolution of the spiritual function, then of necessity will the temporalities be dissolved, and revert to the person from whom they were at first derived. And that the instrument in the case at bar causes a dissolution of the spiritual function, will appear from the words of it. The first part contains the petition of the prior and convent to the pope, in which they state that their possessions are so diminished, and that they are so depauperated, that their corporation cannot continue unless some relief be given to them. The second part contains the proposition of the prior and convent of the aid that might be given them, which was, that whereas there was then a perpetual vicar, there might thereafter be a temporary vicar put in by them on their nomination. The third part contains an ordinance of the pope, whereby it was granted to the prior and convent, that after the death of the then vicar, there should not be any more perpetual vicars, but the church *regatur et gubernetur* by the monks of the priory, or by

secular persons removable at the will and pleasure of the prior and convent. The fourth part contains a *non-obstante* any licence of the ordinary and the constitutions of *Otho* and *Othobon*. The fifth part contains a provision for the cure of souls, and also for an indemnity to the bishop for the loss of his institution, and to the archdeacon for the loss of his induction, and an allowance is made to them for that loss by an annual payment of 2s. The sixth part contains the pope's curse upon those who should infringe the ordinance. All these parts of the instrument shew, 1st. that there are sufficient words to effect a dissolution of the vicarage; for there is an utter exclusion of a perpetual vicar, and an ordinance is made that the church shall be governed by the monks of the priory, or by secular persons removable at the will of the prior and convent. 2dly. They shew that it was the intent to make a perpetual dissolution of the vicarage. 3dly. The subsequent usage shews that this ecclesiastical act made a perpetual dissolution. As to the first, it appears, that since by the instrument there was an exclusion of a perpetual vicar as to cure and function, it will necessarily follow that there must be a dissolution or reverter of that which was given for the serving of the cure; according to the case of 7 *E. 4.* 22. where it is holden, that if an annuity be granted for the exercise of an office, if the office be determined, the annuity will be also at an end; and by 5 *E. 4.* 8. 1 *H. 7.* 29. and 8 *H. 7.* 4. where land is appendant to an office, and passes without livery by a grant of the office; if the office be determined, the land will revert to the grantor of the office. As to the 2d, viz. that it was the intent to have a perpetual dissolution, it appears from the prior's petition, and also by the proposition made by the prior for the supply of their wants, that their design was to have a perpetual dissolution; for otherwise there would not be a perpetual supply of their wants according to their petition and proposition; and when the pope is making an ordinance for their remedy, it cannot be intended but that the remedy shall be proportionable to the mischief: and as the prior and convent were perpetually to serve the cure, or to be charged with the providing of some one to serve it, so they had a perpetual benefit in respect of such charge, according to *Digby's case* in 4 *Rep.* 79. and *Elmer's case* in 5 *Rep.* 2. The *non-obstante* of the ordinance of *Otho* and *Othobon* in the instrument, shew that it was the intention to have a perpetual dissolution, because that ordinance relates to perpetual vicars and their endowments. 3dly. The charge which is imposed upon the prior and convent for the bishop and archdeacon, in respect of their loss of institution and induction, further shews, that it was the intent to have a perpetual dissolution; for it is not reasonable that the prior and convent should have a perpetual

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1 Ro. Rep.
398. 456.
Bridgm. 84.
3 Bulstr.
192.

Supra 207.

charge imposed upon them, and yet should have but a temporary benefit. And it appears by 4 *E. 6. Br. Estates* 78. and *Collyer's case* in 6 *Rep.* (a) that the law makes an exposition of the estate according to the charge; and therefore where there has been a devise to one paying 10*l.*, it has been adjudged to be an estate in fee simple; and *Hil. 13 Ja. B. R. in the case of Webbe and Hearing*, it was adjudged, that where a devise was made to one for life, remainder over to another, paying 10*l. per ann.* for ever, the devisee had a good estate in fee simple according to the proportion of his charge. 3dly. The usage subsequent to the making of this instrument affords a good exposition, that it makes a perpetual dissolution. In 17 *E. 3. 51. Mowbray* took it as a rule, that obscure words are to be expounded by usage; and in *the case of Smith and Barksdale, M. 39. and 40 Eliz. Rot. 209. B. R.* (b) where a rectory was appropriated in the time of *H. 3.* and a vicarage endowed with *decimis garbarum*, it was ruled, that the vicar having been used to take the tithe of hay within the hamlet as well as of corn, that usage should afford an exposition of the ecclesiastical instrument, because it might well be that at that time *garba* might signify hay and grass as well as corn. In 5 *Rep. Cawdrie's case, 4 & 7.* where an ecclesiastical sentence was given by some of the commissioners with the assent of the others, such sentence was ruled to be well enough according to the intendment of the ecclesiastical law, notwithstanding that by the rules of our law it would have been bad. And it appears by 6 & 7 *Eliz. Dy. 293. 34 H. 6. 14. 11 H. 7. 14. 10 Rep. 29.* that ecclesiastical acts are expounded by the judges of our law according to the ecclesiastical law; and the civilians have certified their opinion, that this instrument is sufficient to make a dissolution of the vicarage. 4thly. Admitting that here was not a perpetual dissolution of the vicarage, yet it being reputed as a perpetual dissolution in the hands of the prior and convent, the statute of 35 *Eliz. c. 3. will aid*, which enacts that *all honours, manors, lands, tenements, and hereditaments, which at any time heretofore were the possession of any abbey, monastery, priory, nunnery, &c. were and shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual or real possession of the said late king and his heirs and successors, &c. notwithstanding any defect, want, or insufficiency of or in any surrender, grant, or conveyance of the same honours, manors, lands, tenements, or hereditaments, &c. or any other matter or cause whatsoever, by which* [353] *his highness was or might have been entitled unto the same, &c.* This therefore being taken to be a dissolved vicarage in the hands of

(a) P. 16. a.

(b) Cro. Eliz. 633.

the prior and convent, it shall be so in the hands of the king; and consequently, its defects shall be supplied by this statute of 35 *Eliz.* 1618.

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Montague, Dodderidge, and Houghton, (*Croke* being absent *propter ægritudinem*,) were of opinion that judgement should be given for the plaintiff: and they resolved, 1st. That the statute of 4 *H. 4. c. 12.* does not extend to appropriations made before the 1st of *R. 2.* and that such appropriations as were made before that time are directed and governed by the rules of the common law; so that if the pope had power, by his bull, to make a dissolution at common law, he has still the power to do so; and, consequently, the appropriation in the case at bar being made before the 1st of *R. 2.* the vicarage may well be dissolved, and the statute of 4 *H. 4.* does not prevent it. But, if the appropriation had been made after 1 *R. 2. (a)* then the pope would have had no power to dissolve the vicarage, because that statute strengthens the vicar's estate, so that it cannot be dissolved; nor can its possessions revert to the parsonage, as they might at common law.

2dly. They resolved, that this instrument being an ecclesiastical instrument, ought to receive an exposition according to the ecclesiastical law; and, therefore, if the ecclesiastical law says that it was a sufficient instrument to make a perpetual dissolution of the vicarage, they were bound to give faith and credit to it, and to give judgement accordingly. [354]

3dly. They resolved, that this being a dissolution of the vicarage in reputation in the hands of the prior and convent, and so coming into the hands of the king, the statute of 31 *H. 8. c. 13.* will vest it in the king, and will give it to him, and supply the defects of the dissolution, if any there be, according to *Priddle and Napier's case*; and the statute of 35 *Eliz. c. 3.* will likewise interpose its aid in order to supply any defects.

4thly. They resolved, that the vicarage being dissolved, the lands

(a) *Rolle* states that *Dodderidge* and *Houghton* held, that "if the appropriation had been within the statutes of 15 *R. 2.* and 4 *H. 4.* neither pope nor ordinary could have dissolved the vicarage: for if they could be supposed to have that power, the great design of the statute of 4 *H. 4.* namely, to have a vicar perpetually incumbent, might be defeated at pleasure." And bishop *Gibson* adds, that though such a power of dissolution were supposed to be consistent with the statute of 4 *H. 4.* it seems by no means reconcilable with the disabling statute of 13 *Eliz. c. 10.* against the granting or conveying the possessions of vicars, as well as of others, in any other manner than that statute directs *Gibson's Codex* 754. However in the case of *Parry and Banks, M. 12 Ja.* in the exchequer, (which case was cited in one of the argu-

ments in the principal case, *Cro. Ja. 518. 2 Ro. 100. Palm. 114.*) where a vicarage was endowed in 25 *H. 8.* in a church which was appropriated to the dean and chapter of *St. Asaph*, and in 34 *Eliz.* was dissolved by the bishop and re-united to the rectory, it was holden by the barons, that the dissolution was good; because the appropriation being to the dean and chapter, and so remaining in a spiritual hand which was capable of the cure, it might well be dissolved. And this appropriation being one of those which came into the king's hands in 31 *H. 8.* and was by the king transferred to the dean and chapter, the court further resolved, that if the impropriation had become a lay fee in the hands of a temporal possessor, the vicarage could not have been dissolved, because that would have been in effect to destroy the cure.

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and tithes with which it was endowed should revert to the person from whom they were originally taken : for if there be a cessation of the function, there shall be also a cessation of the benefit. And judgement was given for the plaintiff.

Palm. 222.

A writ of error was afterwards brought in the exchequer chamber, and the judgement was reversed ; not however upon the matter in law, but upon a formal objection to the entering of the judgement. For the action was brought for two lambs ; and for one the jury found a special verdict, upon which judgement was given for the plaintiff ; but as to the other, the jury found the defendant not guilty. But in the judgement the defendant was not discharged of this lamb, nor was the judgement entered as to that *quod querens eat inde sine die*, but only that the defendant be *in misericordiâ* for that lamb ; and for this error the judgement was reversed, *M. 19 Ja.* It may be added, that it appears from the *Liber Regis*, that the vicarage or curacy at this day belongs to the *Britton* or *Breton* family, the impropriators of the parsonage.

P. 17 Ja. A.D. 1619. B.R.

Johnson v. Dandridge. [MSS. Calthorpe.]

Fulling-
mills are
not tith-
able.
Cro. Ja.
523.
2 Ro. Rep.
84. S. C.
Rolle states
that the
prohibition
was grant-
ed.

AUBREY Johnson, parson of _____ in the county of York, libelled against *Dandridge* in court christian for the tithe of a fulling-mill, and for 6s. 8d. which was a *modus decimandi* for a water-mill ; and upon a suggestion that no tithes are payable by the common law of the kingdom for such things as are invented for the ease of man's labour, and that fulling-mills are of that nature, *George Croke* moved for a prohibition ; and day was given to shew cause why a prohibition should not be granted. At which day I shewed cause : and I stated in the first place, that this was a mill newly erected, and being such, tithes were payable for it, according to the statute of *Articuli cleri*, c. 5. in 9 E. 2. where, upon a petition exhibited by the laity, *Quod si aliquis in fundo suo molendinum erexerit de novo, et postea a rectore loci decima exigatur, de eodem exhibeatur regia prohibitio sub hâc formâ, Quia de tali molendino hactenus decimæ non fuerunt solutæ, prohibemus, &c. et sententiam excommunicationis si quam hâc occasione promulgaveritis revocetis omnino* ; the king answered, *In tali casu nunquam exivit regia prohibitio de principis voluntate, qui et decernit talem perpetuò non exire.* And agreeably to this resolution of the king in parliament the practice has always been that tithes are to be paid of newly erected mills ; and a difference has been taken between ancient mills and newly erected ones ; and, therefore, in a case in *B. R.* in 5 *Ja.* it was resolved, that tithes were demandable of newly erected mills, though ancient mills were to be tithe-free ; and according to this difference

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it was agreed *P. 7 Ja.* and in the case of one *Newman, M. 13 Ja.* in *C. B.*; *Tr. 14 Ja.* in *B. R.* in the case of *Bury and Daniel*, *Tr. 15 Ja.* in *B. R.* And in *M. 38 & 39 Eliz.* in *B. R.* in the case of *More and Russell*, it was admitted, that tithes might be demanded for a windmill newly erected; though, because in that case the windmill was erected upon the demesnes of a manor which had been always discharged from the payment of tithes by a modus, a prohibition was granted. 2dly. It appears by the statute of 27 *H. 8. c. 20.* 32 *H. 8. c. 7.* 2 & 3 *E. 6. c. 13.* that tithes ought to be paid according to the ecclesiastical laws and ordinances of the church of *England*, and after the laudable and usual customs of the parish where the party dwelleth; and by the ecclesiastical laws, and ordinances of the church, tithes are payable of mills, as appears by the statute of *Articuli cleri* before cited, and by *Lindwood* in his book *De decimis*, (a) chapter, *Quoniam exsolventibus*, and comment on the words *sicut fœni*, where the opinion of *Peter de Anchona* is cited to be, *quod in decimâ fœni de molendinis, piscariis, lanâ et apibus, quæ de certis locis percipiuntur, non videtur considerata parochia habitationis, sed loci ubi consistit, licet multum plus in horum fructu hominis industria operatur, quam locus facit.* And in the same book, chapter, *Quoniam propter*, and paragraph *De proventibus*, the constitution of archbishop *Stratford* is given; which is, *De proventibus autem molendinorum volumus quod decimæ fidelitè et integrè solvantur*; which word *integrè* the gloss expounds to be *sine diminutione, sicut solvantur decimæ proventus, verè, sicut proventus accidunt, viz. decima mensura quorumcunque granorum molitorum ad commodum domini molendini vel molendinarii pertinentium. — Et scias, quod fructus provenientes ex molendino decimabuntur tanquam prædiales, non deductis expensis factis in re, circa rem, vel extra rem.* And the tithing table in the 11th question set forth by the allowance of the church of *England*, determines, that the tithes of mills, parks, ponds, warrens, dovehouses, and bees, are predial and tithable without deduction of charges, and the 10th measure of the corn is to be set out. And in the 4th question of the tithing table, a predial tithe is explained to be that which is perceived of the ground, and gathered of and from a place certain, in some one or other known, certain, and limited parish. And such tithes are to be paid to the parish church where the grounds do lie without deduction of charges, howsoever the industry and labour of man may seem and be alleged more to prevail in the making thereof, than the nature of the ground. And *Rebuffus*, fo. 23. § 6. saith, (b)

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(a) *Lyndewode's Provincial*, lib. iii. fo. 98. (Paris ed. 1505.)

(b) This passage is extracted from *Rebuffus's Tractatus novem de decimis*, &c. a very scarce book, which I met with in the library belonging

to the College of Physicians in *Warwick Lane*, where there is a very good collection of civil and canon law. (This work, together with others by the same author, are to be found in the Bodleian Library, Oxford. Ed.)

1619. *De molendinis decima prestatur, ut si decem sextaria frumenti, siliginis, aut alterius grani molendini nomine consequar, unum pro decima solvere adstringor, vel aliàs pro ratâ: si vero pecunia pro molendini pensione solvatur, ex illâ pecuniâ decima solvetur illi ecclesiæ ubi molendinum situm est, etiamsi esset molendinum ad ventum, vel molendinum cathenâ super fluvio teneretur.*

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And as to what has been objected, that the mills in the case at bar are fulling-mills, and of new invention, and that therefore the statute and ordinances above cited cannot extend to them, for that they only intend such mills as were in use at that time, I answer, that the statute and ordinances are generally of mills, which is the genus, and the others are but the species contained under the genus; and the statutes and ordinances being general of a mill, a fulling-mill is contained under it. And it appears by *Luttrell's case*, 4 Rep. 87. that a fulling-mill may be recovered by the demand of a mill generally; and a prescription to have a water-course to a corn-mill will serve where the corn-mill is changed to a fulling-mill. And as to the objection that the tithes of fulling-mills are personal, and the statute of 2 & 3 E. 6. enacts, that personal tithes shall not be paid but where they have been accustomedly used to be paid within 40 years before, I answer, 1st. From the authorities before cited that the tithes of mills are predial. 2. The statute declares what are to be understood to be personal tithes, where it says, that "every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of person and in such places, &c." so that he who works a fulling-mill cannot be said to be any of the persons there enumerated, for which reason it cannot be said to be a personal tithe. And in *M. 12 Ja. in C. B.* where, upon a libel against *John King* for the tithes of two grist-mills, a prohibition was moved for, because in the place where the grist-mills then stood there had been a fulling-mill, for which and another grist-mill, there had been time whereof, &c. 6s. 8d. per annum paid, and that at such a time the fulling-mill was converted into a grist-mill, and that he had paid the 6s. 8d.; *Warburton* and *Nichols J.* refused the prohibition, for the modes could not extend to a grist-mill, that being a new thing; and tithes are to be paid in a different manner for a fulling-mill than they are for a grist-mill; for a fulling-mill they are to be paid by the 1d. and of a grist-mill by the toll-dish. And so upon the whole matter I concluded that tithes were to be paid of fulling-mills.

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Montague C. J. Croke and *Houghton J.* seemed at first to incline that a prohibition should not be granted, for that tithes ought to be paid of fulling-mills as well as of other mills; but they seemed to say that they were personal, and not predial tithes. But *Dodderidge J. e contra*; for he said that a great inconvenience would ensue

if tithes were to be paid of fulling-mills; for by the same reason that they might be paid of fulling-mills, they might be paid of paper-mills, iron-mills, tin-mills, and all other mills of that nature, which would be excessively inconvenient. And he did not know in what manner tithes would be paid of fulling-mills, for it is not reasonable that they should be paid of the tenth cloth. And he did not find any text in the civil law, nor any opinion what tithes were to be paid of such mills. (a)

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Wright v. Powle. [MSS. Calthorpe.]

SAMUEL Wright and *John Baldwin*, the impropriate rectors of *Chesham* in the county of *Buckingham*, libelled against *Richard Powle* for the tithes of aspen and cherry trees (b): and upon a suggestion that those trees were of the age of 20 years, and are by the custom of that country reputed as timber-trees, a prohibition was granted, and a motion being afterwards made for a consultation it was refused; for that may be timber in one country which is not timber in another country; as the cutting of willows and sallows may be waste in one place, and not be so in another. The court therefore advised the defendants in prohibition to try whether there was any such custom. (c)

Aspen trees
may be tim-
ber by cus-
tom.
Hob. 293.
S. C.

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M. 17 Ja. A.D. 1619. B.R.

Dickinson v. Reade. [MSS. Calthorpe.]

IN an action on 2 & 3 E. 6. brought by *Dickinson*, lessee of *Fleming*, the son and heir of sir *Thomas Fleming*, chief justice of *England*, against *Reade*, lessee of *Popham*, the case appeared to be as follows: The abbot of *Quarrer* in the county of *Southampton*, being seised of the rectory of *Arreton*, and also of a grange called

2 Ro. Rep.
118. S. C.
by the name
of *Dixon's*
case.

(a) *Tillot v. May*, 3 Atk. 19. *infra*, 782. R. A. 641. *Hicks v. Triess*, 3 Wood, 363. *infra*, 1022. *Wilson v. Mason*, 3 Wood, 28. *infra*, 974.

(b) *Bilby v. Hussey*, Bun. 192. *infra*, 657. n.

(c) *Lapthorne* sued in the spiritual court of *Gloucester* for the tithe of wood; and *Bridgeman* moved for a prohibition, because the suit was for beeches, which were of a great age, viz. eighty years old at the least; and also because the parson of the parish had had a consideration for the tithe of wood, namely a certain wood in the lord's wood for the tithe of wood time whereof, &c. and that he had never taken any tithe of wood. — *Coke*. — *Buck* is a beech, and thence the county of *Buckingham* took its name; and beech is timber in that country, and therefore it was adjudged in *Sir George Carye's* case that waste lay for beeches there. And in the parish in which I live tithe

wood has never been paid; but the parson has a wood, which is called the tithe-wood, for which he pays 4d. a year to the lord of whom he holds it. It shall be intended therefore that the wood in question was given upon a composition for all the tithe of wood within the parish, no tithes of wood having ever been paid. And a prohibition was granted, *Lapthorne v. —*, 1 Ro. Rep. 355. P. 14 Ja. — A record of a prohibition was shewed by *John Moore* serjeant, P. 14 Ja. Rot. 1918. between *Guffy* plaintiff, and *Pindar* parson of *Hottesfont* in the county of *Southampton*, for tithes of willows, upon a surmise that they are of use as timber in that country. If willows grow within the site of a house, it is waste to fell them; yet, if they be felled, I hold they shall pay tithes. Note the reason, *Hob.* 219.

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Unity of
possession
of lands
and rectory
in a reli-
gious house
will afford
no exemp-
tion, if the
tithes were
in lease at
the time of
the dissolu-
tion.
Supra 287.

Tithes not
separated
from the
rectory by a
lease for
years of
them.

Tithes were
granted by
the crown
with other
possessions
of an abbey,
and the
grant stated
the pre-
mises to be
of a certain
value, as
mentioned
in a parti-

Arreton Grange in *Arreton*, in 16 H. 8. made a lease for 90 years of the grange and the tithes of it to J. S. Afterwards, the rectory of *Arreton*, the grange, and all the possessions of the abbey, came to the king by the statute (a) of dissolutions. In 2 E. 6. (b) the king granted the rectory of *Arreton*, and several other lands of the abbey, to one *Hills* (under whom sir *Thomas Fleming* claimed) *quæ omnia præmissa extenduntur ad clarum valorem 32l.* which value was specified in the particular of the auditor of the crown, to which the patent referred, and it appeared that the tithes of the grange were not mentioned in the particular, and that the lands and rectory contained in the king's patent were of the value of 32l. exclusively of the tithes of the grange; and the king afterwards granted the rectory in fee-farm. And now it was resolved by *Montague C. J. Croke, Dodderidge, and Houghton J.* 1st. That tithes were to be paid for the grange as soon as the lease for years was expired, notwithstanding the union of the rectory and grange in the hands of the abbot at the time of the dissolution, and notwithstanding there were no tithes in specie paid to the abbot at that time, agreeably to the resolution in the case of *Dobitofst* and *Curteene*. For it appears from the lease of the land and tithes, that there was not any real discharge of the grange, but only a personal discharge in respect of the union; in which case, as the rectory and grange are now come into the hands of several persons, tithes shall be paid of them: and if there had been no lease expressly made of the tithes, the abbot would have had them notwithstanding the lease of the land. (c)

2dly. They resolved, that the tithes of the grange remained parcel of the rectory notwithstanding the lease for years, so that by the grant of the rectory the reversion of the tithes passed.

3dly. They resolved, that the *quæ quidem præmissa sunt annui valoris, &c.* are not words of restraint, so that nothing would pass beyond that value; but that they are merely words of declaration to shew what value those things which passed were; and though those should be of greater value than was mentioned in the particular, yet the patent would be good upon the statute of 1 E. 6. c. 8. and there is only an allowance to be made to the king for the over-plus of the value according to the rate of 20 years' purchase. And *Dodderidge* said, that the tithes of the grange are included in the value of the rectory; for though there is a lease for years of the grange and tithes rendering rent, yet the rent issues out of the

(a) Qu. for this was one of the lesser abbies. *Lord v. Turk*, Bun. 122. *infra*, 1313. *Cowley v.* (Probably dissolved under 27 H. 8. c. 28., on *Keys*, *infra*, 1308. *Porter v. Bathurst*, Cro. Jac. 554. 559. *supra*, 132. n. 373. *Wright v. Gerard* this point, see *Clavill v. Oram*, *post*. 1354.)

(b) *Tanner* says that the grant was in 36 H. 8. *And Hildersham*, Hob. 306. *infra*, 375. *Clavill v.*

(c) *Benton v. Troit*, Mo. 528. *supra*, 208. *Oram*, *infra*, 1354.

grange, and not out of the tithes, though it be increased in respect of the tithes.

The value of the tithes was trebled in this case by the jury; and notwithstanding the plaintiff declares of tithes of several things, yet it is sufficient to lay the damages entirely.

cular did not include the value of the tithes: the tithes nevertheless passed.

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v.
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cular, but
that parti-

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Earl of *Clanrickard* v. Lady *Denton*. [MSS. (a) Turnor.]

THE earl of *Clanrickard* was plaintiff in a prohibition, and lady *Denton* widow was defendant: the case was as follows: Lady *Denton* being proprietrix of the impropriate parsonage of *Tunbridge*, which parsonage is within the ancient precinct well known and called by the name of the *Weald of Kent*; and the earl of *Clanrickard* being seised in right of *Frances* his wife of several coppices within the above parish, and within the precinct of the said *Weald*, the earl fell several of the coppices, and lady *Denton* libelled against him in the spiritual court for the tithe of fellable and saleable wood, that is, for the underwood of those coppices. The earl came into this court, and suggested that there is an ancient precinct called by the name of the *Weald*; within which precinct there are divers parishes; and that within that precinct, the parish and the place where the present question arises are situated, and that through all that precinct from time whereof the memory, &c. there has been a custom that all owners and proprietors of any coppices or woods shall be discharged of tithe for all manner of wood; and thereupon he prayed a prohibition, which was granted. And lady *Denton* joined issue with him, that there was no such custom; and there was a trial at bar upon this issue or custom, in which the right of the custom was not to be debated, to wit, whether it were a good custom or not; but whether there were such a custom *de facto* or not. And on the part of the plaintiff to prove the custom this evidence was given. Witnesses deposed, that through several parishes within this precinct they had seen several coppices fallen, and no tithe paid for them. And for this the testimony of those who had bought the wood of these coppices was thought the more proper; for the buyer is to pay the tithe, and not the seller. And the general testimony of others, who said they had not seen any tithe paid, was not thought material, being merely negative. Note, in this case the testimony of all those, of whatsoever condition or reputation they were, who were entitled, either as owners or farmers

The exemption
from tithe
of wood in
the *Weald*
of *Kent*,
how proved,
2 Ro. Rep.
122. S. C.
Palm. 37.
S. C.

(a) This case is extracted from a manuscript the father of Sir *Edward Turnor*, who was made book of reports in the collection of Mr. *Hargrave*: chief baron 23 May 1671, and who had been the book was written by Mr. *Arthur Turnor*, whom speaker of the House of Commons. *Hargr.* we have already mentioned, *supra* 165. He was *Bibl. Brit. Mus. No. 30.*

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ton.

to any wood within the *Weald of Kent*, was rejected : for the custom being alleged to be general through the whole *Weald*, though they were not parties to the suit, yet, for that the custom concerned them in their private profit and in this immunity, they were *quasi* parties, and their testimony *quasi in propria causa*. As in the case of a common, if the right be alleged in a whole vill, though the suit be between particular persons, yet none of those who claim common under the same prescription shall be admitted to give evidence. So, in the case of a *modus* laid in a whole vill : for those within the vill are parties in interest, though not to the action. So, in disproof of the custom, the evidence of any person who was owner, proprietor, or farmer of a parsonage, was rejected. They also shewed, that upon the like suggestion for the like custom in the *Weald of Sussex* (a), which adjoins to the *Weald of Kent*, a verdict had found the custom. And in * *Sir Moyle Finch's case*, where the issue was upon the custom in the *Weald of Sussex*, after full evidence, the custom was so strongly proved, that the plaintiff was nonsuited. But for aught that appeared to the contrary, this was the first trial of this custom in the *Weald of Kent*.

* In C. B.

But for the inducement of this custom ; that it was good *de jure*, the plaintiff's counsel offered these reasons. 1. They said, that before the constitution made at a council held in 17 E. 3. under *John Stratford* then archbishop of *Canterbury*, no tithe was paid for any wood. And this canon or constitution is recited by *Lindwood*, (who made a collection of the canons in the provincial councils), in his 3d book fol. 189. *cap. Decimæ de silvis cædvis*, &c. and in the preamble of the canon it is recited, that people were then in the custom of paying no tithe of *silva cædua* ; but the canon only declares what shall be accounted and reputed *silva cædua* : and from the preamble they inferred, that it proved, that people were not in the custom, prior to that time, of paying any tithe of wood. They then cited the several petitions in parliament by the commons in the following year, mentioned by *Selden*, c. 8. 237, 8. which prove, that the commons conceived themselves to be aggrieved by being compelled to pay tithe of wood. And in *Doctor and Student*, Di. 2. Cha. 55. it seems that tithe of wood was not antiently paid ; but when parsons demanded the tithe of all wood, then the statute of 45 E. 3. was made, which though not so large as the common law, yet does not restrain the common law ; so that if a prescription at common law to be discharged of tithe of wood were good, it will still remain good, for there is no law against it, nor does the constitution ; if it be received, enact the contrary. *Dodderidge J.* —

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(a) According to *Palmer*, the issue upon the custom in the *Weald of Sussex* had been tried the year before in *B. R.* And the like custom had been found in the *Weald of Surrey* upon two trials in *C. B.* and *B. R.*

The intention of the constitution was only this: all wood being either timber or underwood, which is called *silva cædua*, and no tithe, it seems, having been paid for timber, but only for *silva cædua*, the canon declares what wood shall be deemed *silva cædua*. But *Selden* told me, that before this constitution of 17 E. 3. by the canon law, tithe of wood was without doubt payable: but those canons were not received and incorporated into our law, and canons are of no power unless they are received and allowed by our law; so that it seems by the old common law tithe was not paid of wood, and as it seems to me, in the several statutes made in the time of E. 3. recited in *Selden*, fo. 238, 9. &c. there is no enactment at all for the payment of tithe of wood: but it is only enacted by them, *que soit fait, come au estre use devant*. And in divers places, as it seems, no tithe had been used to be paid for wood; so that if this usage continued in any place *de non decimando* for wood, such place will be discharged by law of that tithe at this day. And *Selden* thought that a prescription *de non decimando* might be good at this time: for the opinion of *Choke* in 8 E. 4. that a prescription *in non decimando* is not good, is the first authority in our law for that doctrine, and from whence he had it, appeareth not; and since that time his opinion hath been received and continued; but perhaps, if it were examined, it would be found to be but an error.

But the particular reasons for this custom to be discharged of the tithe of wood in the *Weald of Kent* were these: 1st. This is not a prescription in any particular man or place, but it is a custom through this whole precinct; and in *Doctor and Student*, (a) c. 55. a whole country may prescribe to be discharged of tithe of wood. 2. As this precinct of the *Weald* was formerly so overgrown with wood that the parsonages were of small value, and their profits were much increased by the cutting down of the wood, and converting the land to tillage, it may therefore be presumed, that there was a general agreement made by the clergy in respect of this, to discharge it of the tithe of wood. 3. In former times, there was such plenty of wood, that it was of no value, and the tithe not worth taking, and thence possibly the custom of not paying any tithe for it. And this custom had continuance till of late years, when wood began there to be of value. And it is conceived that the value in the present case has raised the question.

In this case lady *Denton* had also libelled for the tithe of hay in a meadow within this parish: whereupon the earl suggested for a prohibition, that this was parcel of the priory of *Tenbridge*, and that this priory and all its possessions came to the king, and were vested in the king by the statute of 31 H. 8. and he recited the

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2 Ro. Rep.
207. Palm.
37. S. C.
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 ton.*

after a con-
 sultation has
 been award-
 ed, if there
 be any ma-
 terial addi-
 tions made
 to the libel.

clause of discharge in the statute; and farther alleged, that the prior and his predecessors from time whereof, &c. and at the time of the dissolution, held this land discharged of the payment of tithes, and he made title to the land. Issue being taken on the prescription of discharge in the priory, it appeared in evidence that this priory was of the order of *Cistercians*, and that they held their lands discharged of tithes *dammodo propriis manibus aut sumptibus excolebant*: but that their farmers had paid tithes. (a) So that upon this issue of an absolute discharge it was found against the plaintiff in the prohibition, and a consultation was awarded. And now in the spiritual court, *addendo* to the former libel, there is an article, that though the prior and his predecessors from time whereof, &c. held this land discharged of the payment of tithes, (*quod non fatetur*), yet for these sixty, fifty, forty, thirty, twenty, or ten years last past, tithes have been received and paid in kind for the land; and so by this trick, though this land was discharged in manner above mentioned and by law; yet, by reason of this payment afterwards, they asked sentence in favour of the parson. And so here there is an enlargement or change of the libel; and therefore upon the statute 5 E. 3. c. 4. the defendants moved for a new prohibition; for the original libel is in common form, and now in that which is stiled an addition (though the canonists say, that that which is stiled an addition is in truth but an illustration of the former libel) there is a pretence of payment since the dissolution, and upon this payment, if it be proved, they pray sentence for the parson. And there was a great debate, whether this addition in the spiritual court after consultation granted was an enlargement, or alteration of the former libel; and this court being of opinion that it was, the counsel for the plaintiff in the spiritual court agreed to waive these additions, and to proceed solely upon the old libel: so no prohibition was granted. But *Dodderidge* J. said, if this land was discharged of tithes in the hands of the prior, and the priory was vested in the king by the statute of 31 H. 8. so that such discharge as was in the priory ought by the law to remain, though tithes have been paid ever since the making of the statute, and they therefore pray sentence for the parson, yet a prohibition shall be granted after sentence: for by law this land was discharged of tithes; and this constant payment ever since the statute (admitting it to be so) does not make it chargeable by the laws of the realm and, therefore, if their sentence be contrary to the law of the realm, a prohibition ought to be granted.

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(a) *Ingram v. Thackston*, *infra*, 819. *Stavely v. Ullithorn*, *Hardi*. 101. *infra*, 1007.

M. 17 Ja. A.D. 1619. C. B.

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Canning qui tam, &c. v. Jones. [MSS. Turnor.]*Canning qui tam, &c.*

v.

Jones.

UPON an information exhibited by *Canning* against *Jones* upon the statute of 21 H. 8. c. 13. for non-residence upon his benefice by the space of eleven months, a special verdict was found to the following effect: The parish of *All Saints* and the parish of *St. Andrews* are situated close together, and the houses of each are intermixed one with the other, and the churches are divided from each other only by a high road. *Jones* was presented to the church of *All Saints*, and admitted, instituted, and inducted thereto, and there being in that parish only a cot and no parsonage-house, in which any hospitality could be kept, he repaired it and put it into a better plight than it was, though having only one room, and that next to the ground, it was unfit for habitation. *Jones* was afterwards presented, admitted, instituted, and inducted to the church of *St. Andrews*, in which parish there was a convenient parsonage-house, and he built there a barn, and kept it in good repair, and put all his provision in it, and held the house in his own hands, and his servants slept in it, but he himself resided in another house, which he had in right of his wife, but four poles distant from the parsonage-house, and situated in the parish of *All Saints*.

If a person has two adjoining benefices, one of which has a house, but the other has not; and he resides in a house in the latter parish, at a small distance from the parsonage-house in the other parish, which parsonage-house he does not let out, but occupies with his servants and goods. Qu. Whether he be liable under the statute for non-residence in the parish which has the parsonage-house?

Henden serjeant, for the plaintiff insisted that this was non-residence within the statute. The first point he made was this: The parson of *Dale* resides in another house within his parish, and not on his rectory, that is, in his parsonage-house: the question is, whether this be a non-residence within the statute? And I say that it is. Both the canon law, and the common law, before the statute of 21 H. 8. prescribed to, and required of, every incumbent upon institution an oath for his residence *super rectoriam*, if it was a rectory; and if only a vicarage, *super vicariam*; and in case he did not reside there, he used to be cited to the ecclesiastical court *pro lesione fidei*. There was a canon also requiring the parson to use hospitality and to repair the parsonage-house; by which canon I conceive that the intention of the oath was, that he should reside in the parsonage-house, and not merely in the parish. And the statute of 21 H. 8. seems to be but a confirmation of the canon and common law, and only to superadd a penalty in case of non-residence. The words of the statute are, "shall be resident and abiding in, at, and upon, his benefice," which shall be intended in his parsonage-house, if it is habitable. In 34 Eliz. B. R. *Brown* and *Hudson's* case, the parson resided in another house within his parish, and not in the parsonage-house; and it was resolved to be a non-residency. [But *Winch J.* said, that the fact in that case was, that he resided in an adjoining

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parish.] In 8 *Ja. C. B.* (a) *Canning*, the now plaintiff, informed against one *Newman* for non-residency: and in that case it was found by a special verdict, that the parsonage-house was convenient, and that the parson resided in another house in his parish: and it was agreed by *Coke C. J. Warburton* and *Foster J.* to be a non-residency, though *Walmsley* argued to the contrary: but the informer was allowed to compound the matter, and a composition was accordingly made, and no judgement was entered. In 6 *Rep.* 21. (b) it is held to be non-residence. 7 *E. 6. Dy.* 284. cites 29 *Ass.* if rent is granted to be perceived of a college or abbey, the site only is charged; and a college shall be taken only for the site of it, and not for every thing appertaining to it: so here, "benefice" shall be construed to be the parsonage-house, and not the whole parish; and this was said in *Newman's case*. The second point was, an incumbent has two benefices adjoining to each other; and in the one benefice there is no house that is habitable; and in the other there is a convenient house, but the incumbent resides in a house in his other parish: the question then is, whether he shall be said to be non-resident in the parish where he has a house. And I contend that he shall. It is true, that if a man has two benefices, in each of which there is a parsonage-house, he may reside in which of them he will by the express words of the statute, and shall not be said to be non-resident in the other: but, if a man has two benefices, and in one of them only there is a house, and he reside in a house within that parish which has no parsonage-house, he shall be said to be non-resident in the parish where he has a parsonage-house.

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Althow serjeant, for the defendant.—The first point which has been made is, whether, if the parson reside in another house within his parish, and not in the parsonage-house, this shall be said to be a non-residence within the statute? It has been objected, that the statute of 21 *H. 8.* is but a confirmation of the canon law, which was also the common law, being received and incorporated into it; and that the canon law requires an oath upon the institution of the incumbent for his residency *super rectoriam*. If this be true, then we are to consider how the canonists construe the words "*super rectoriam*." And unquestionably, it is clear that by their law this is not a non-residency. For, by their law, if the parson serve his cure, and be inhabitant among his parishioners for hospitality and his good example in life, though he does not reside in the parsonage-house,

(a) See a very indistinct report of this case in 2 *Brownl.* 54. The facts of the case were these: "Dr. *Newman*, the defendant, was rector of *Staplehurst* in *Kent*, and was also seised of a house in *Staplehurst*, situate within twenty yards of the rectory-house: it was found that the rectory-house

was in good repair, and that the Dr. held it in his own occupation with his own goods, and did not let it to any other, but that he resided himself in his own house, and not in the rectory-house."

(b) *Butler* and *Goodall's case*.

yet he has fulfilled his oath, and is resident. This therefore is the construction which the canonists put upon the words "*super rectoriam*" in the oath; and if the statute be but a confirmation of the canon law, it must be expounded according to it. But the real doubt is, if this word "*benefice*" in the statute of 21 H. 8. has so restrained the incumbent at this day, that it is not now sufficient for him merely to be inhabitant with his parish; but that he must also reside in the parsonage-house, else he will not be resident according to the intent of the statute. And I think that it is a sufficient residence within the statute, if he reside in the parsonage, though not in the parsonage-house. As to the authorities that have been cited against me, I answer, that the first case does not apply, because there the parson resided in *another* parish. In the second case there was no judgement, but perhaps a sudden opinion, which might be altered. And as to *Goodall's* case in 6 Rep. (with reverence to the book), I know that no judgement was ever entered up in that case: so that the present case comes now for judgement clearly and without any authority the one way or the other. I will therefore examine the statute of 21 H. 8. and thereupon consider the preamble, the body, and the proviso in the statute. 1st. Taking the preamble of the statute, it is in our case fully satisfied; the cure is served, hospitality kept, and example in living given by the defendant's dwelling within his parish among his parishioners: and it is found too that the parsonage-house is in good repair, so that there is no mischief. 2dly. Taking the body of the statute, that is not infringed in our case; the words are, "*but absent himself wilfully, &c. and make his residence and abiding in any other places, &c.*" which shall be construed, and shall imply the statute to mean, a wilful absence from his cure and parish. And if the construction is to be, that the statute means residence in the parsonage-house only, in that case, if there should be no parsonage-house, the incumbent might be non-resident; which construction would give great liberty to non-residence, for there are many places where there is no parsonage or vicarage-house. But I conceive that though there should be no parsonage-house, yet the incumbent is bound to reside upon his benefice, if he can have any other convenient house within his parish: so that the word "*benefice*" in the body of the statute shall not be restrained to the parsonage-house. 3dly. The last proviso in the statute explains that the statute does not intend to confine the residence to the parsonage-house; for it gives liberty to the parson to take in farm any dwelling-house in any town for his habitation; which, according to my construction, must mean, that within his parish any parson may elect his dwelling-house. For if this were to be construed to mean a parson only who had no parsonage-house,

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Jones.• Vide supra
204,
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then the proviso would have been particularly penned, namely, that any parson, *having no parsonage-house*, may take to farm, and would not have been general, as it is. I will also examine this statute by other statutes. I will take the statute of 13 *Eliz. c. 20.* of leases. Which statute well explains what construction is to be made of the word "benefice:" for by this statute an incumbent may lease his benefice, which is to be understood of the whole, as well the parsonage-house, as the rest; but such lease shall remain in force only while the lessor shall be resident, and serving the cure without absence above 80 days. If then the 13 *Eliz.* intends that the parson may lease all his benefice, namely, the house, glebe, and tithes, and that yet he may be resident; it does not restrain residence to be the parsonage-house; for he cannot reside in it against his own lease; and, therefore, if he reside in any other house within his cure, the statute will be satisfied, and he shall be said to be resident. I will mention the case of the parson of *Easton* in *Suffolk*, upon evidence before lord *Coke* as judge of assize: in that case, the parson had made a lease of his parsonage-house to one *Ruchwood*, and the parson resided in another house within his cure, and would have afterwards avoided his own lease under the statute of 13 *Eliz. c. 20.* upon the ground of non-residency, *viz.* that he had been absent by the space of 80 days, &c. from the parsonage-house: and lord *Coke* over-ruled it upon the evidence, and held that it was not a non-residence within the statute, and would not permit a special verdict in the case. And if the statute of 13 *Eliz.* does not confine residence to the parsonage-house, which statute is for the advantage of the parson, and to the disadvantage of his lessee; this statute of 21 *H. 8.* which is penal upon the parson, shall not be construed to restrain residence to the parsonage-house, and to take the word "benefice" so strictly; for penal statutes are not to be construed strictly, 31 *H. 8. Dy. 22.* In the last place, the oath, which was to be taken by every incumbent, shall not be construed to restrain residence to the parsonage-house; for the oath is to be taken upon institution, when the parson has nothing to do with the house, for before induction he has not the temporalities. If then residence be restrained to the parsonage-house, this will open a gap to non-residence: for if a presentee is admitted and instituted, and will remain so without taking induction, so that he has nothing to do with the house; by this construction, such an incumbent might be non-resident. There is no judgement in point, and therefore the present question comes clearly and without foil for the judgement of the court.

As to the second point, the case stands thus: The information is brought for non-residence in the parish of *St. Andrews*; and it is

found that the defendant resides in a house in the parish of *All Saints* (of which he is also parson) on his own land, and that within that parish upon the matter there is no parsonage-house; for it is found that there was no house upon that benefice when he came to be incumbent, but only a ruinous barn; and it is also found that his parsonage-house in the parish of *St. Andrews* is not distant quite the space of an acre from the house in which he lives, though they are in different parishes; and that the defendant keeps this parsonage-house in his own hands, and applies it to his own use, namely, to lay corn in, and to lodge servants, though his own habitation is in the other house. Surely, this cannot be said to be any non-residence in this parsonage-house; for this house and the other in which the defendant himself lives, are now as one house; and it is found that the parsonage-house is well repaired: and by the use of that house with the other, the defendant's habitation is enlarged, and made more convenient for hospitality. Nor do I agree to the position, that if an incumbent has two benefices, upon one of which there is a house, and upon the other none, that he is bound to reside upon that benefice where there is a house; but I think that he may, if he pleases, reside in any house upon the other benefice.

Robert C. J. advised the counsel to search for precedents; but he said that it would be difficult to match the case. *Adjournatur.* [369]

The case was afterwards argued *M. 18. Ja.* by *Bawtrey* serjeant, for the defendant. — This is not a non-residence, either within the words or the intent of the statute. It is not within the words, for there is not one word of a parsonage-house in the statute; and it would have been an easy matter for the makers of the statute to have mentioned the parsonage-house, and to have appointed that the parson should be resident in it, if they had meant that the statute should extend to it. The words are, that he shall be resident at, in, or upon his benefice; so that we must examine what shall be said to be his "benefice." By our law the word "benefice" contains and comprehends within it, the church, the glebe, the tithes, the spiritual charge and function; and the civilians agree in this description of the signification of the word. A bishop may be said to have a benefice, and that shall be intended of his whole diocese; and so a parson has a benefice, and that is his whole parish. It is all one as if the statute had said in this case, that he shall be resident at, in, or upon his parsonage: the word parsonage could not have been construed to be intended of the parsonage-house; for parsonage and parsonage-house are not all one, nor are they convertible terms; for then they must be co-extensive. There is as great a difference between parsonage and parsonage-house, as

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there is between manor and manor-house; and if there be lessee for life of a manor, and the lessee have covenanted to dwell in or upon the manor; there, if he reside in any house within the manor, it is sufficient, and the covenant is performed, though he do not reside in the manor-house. This, therefore, is not a non-residence within the words of the statute. Neither shall it be said to be a non-residence within the intent of the statute. It has been objected, that the exposition which has been made of the statute is, that the parson must reside in the parsonage-house; that so it was resolved in *Butler's case*, 6 Rep. (a) and that this shall be taken by equity to be within the statute. I answer, that in *Butler's case* there was no judgement given, as I am informed; but that there was a difference of opinion in it; and that is the only authority against me; and therefore, notwithstanding the exposition there, the present case comes clearly and without foil for judgement. It has been objected, that the statute extends to, and is intended for, the maintenance of the houses and habitations of the parsons; &c. which will be neglected if the parson do not reside in the parsonage-house. I answer, that the parsonage-house may well be maintained in his absence, and though he himself should not reside in it; as the lessee for years, or for life, is bound by law to repair, and yet the law does not oblige him to reside in the house. It is as bad an argument or consequence, that because the parsonage-house must be repaired by the parson, therefore he must abide in it, and be resident in it; as it is to say, because he is resident in the parsonage-house, therefore it is maintained by him. It will be a long gradation to bring this within the intent of the statute; namely, the statute intends the maintenance of the house, and the maintenance of the house intends a residence in it; so that there will be intentment upon intentment to bring this within the statute. And if the parson shall be said to be non-resident, if he do not reside in the parsonage-house, because that shall be said to be neglect of the maintenance of the house; by the same reason then, if he reside in the parsonage-house, and do not maintain and repair it, he shall be said to be non-resident. And the parsonage-house is chancel, not the principal part of the possessions which the parson ought to repair. But the serving of the cure is the principal thing aimed at by the statute, and to which it wished to bind the parson. It does not intend to make any provision for the temporal possessions, or the maintenance of the houses, for the law had already provided for that. And every thing which the statute has provided for enforces the opinion, that it aimed only at a provision for ~~the maintenance of the houses, and the maintenance of the parsonage-house~~
(a) *Butler and Goddard's case*, 6 Rep. 27. b.

ing the cure. If the statute had intended to bind the parson to reside in the parsonage-house, it would have provided, that if there be no parsonage-house, he shall not be bound to residence. But it will be said, that such a provision would have been needless; for the law would make that exception in his favour, and excuse his residence if there were no parsonage-house. I answer, that the statute has provided for things quite as unnecessary, in order to explain its intent: as, that spiritual persons beyond the sea in the king's service shall not by that statute be non-resident; and yet unquestionably, without such a provision, the law would have excepted such persons. So in the proviso in the 31st clause, which excepts a parson out of the clause of non-residence, where there is a vicar endowed: for though the statute excuses him from residence, yet it shall not be construed to excuse him from the maintenance and repair of his house; for he will be still chargeable for dilapidation; and therefore residence and dwelling shall not be confined to the parsonage-house. Besides, *residence* by the statute is opposed to *absence*; and *absence* by the statute must be absence from the cure and the parish; so that he will be resident within the statute, if he reside in any part of the parish. And subsequent statutes shew that this statute had no eye to the temporalities. Thus the statute of 28 H. 8. c. 13. and 39 H. 8. c. 28. which were made with reference to or in explanation of the statute of 21 H. 8. shew, that the visiting and instruction of his cure and charge is the thing provided for by the statute of 21 H. 8. Indeed there was no occasion for that statute for the maintenance of the houses; for parsons are punishable at common law for the decay of those; 4 E. 4. they are deprivable for it; but there was no punishment for neglect of the cure, nor any obligation to the serving of it, but the obligation of conscience. Besides, after the statute of 21 H. 8. the parson had power to lease the parsonage-house until the statute of 13 Eliz.: and if he had power to lease, he could not be bound to be resident in it. Before induction too the parson has not the temporal possessions nor any thing in them, and yet by institution he has the cure and charge: but, if this construction be admitted, though he has the cure, he shall not be bound to residence until he has the temporal possessions. It has been agreed, and objected, that it is a construction from the intent only of the statute which makes residence in the parsonage-house to be within the statute. It may be well answered, that a penal statute, as this is, shall not be taken by equity. *Pl. Comm.* (77.) *Partridge* and *Oroke's* case is, that penal statutes, where there are not words to warrant it, shall not be taken by equity. If then a man has two parsonages, and one has a house upon it, and the other has not; he shall not be bound

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*Channing qui
 tam, &c.*
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to residence upon that benefice where the house is, for his election shall not be taken away on that account. 10 Rep. 138. (a) and 5 Rep. 21. *Laughter's* case prove this. (b)

[*I have not been able to discover what was the final resolution in this case, nor to trace it any farther.*]

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M. 17 Ja. A. D. 1619. B. R.

Wood's case. [MSS. Calthorpe.]

A surmise in a prohibition that the lands lie in a different parish than that which the libel supposes, need not be proved within the time limited by st. 2 & 3 E. 6.

A PROHIBITION being granted in the case of one *Wood*, upon a surmise that the lands, whereof the tithes were demanded, lie in a different parish than that which was supposed by the libel, *Bridge-man* moved for a consultation, because the surmise was not proved within six months according to the statute of 2 & 3 E. 6. (c) But a consultation was refused; for this being a surmise upon which a prohibition was grantable at common law, and being neither a surmise upon a modus, nor upon a prescription to be discharged of the payment of tithes, need not be so proved.

M. 17 Ja. A. D. 1619. B. R.

Congley v. Hall. [2 Ro. Rep. 125.]

A surmise that the lands were discharged before and at the time of the dissolution of the monastery by reason of unity of possession, must be proved within the time limited by st. 2 & 3 E. 6.

It was surmised, in order to have a prohibition to a libel in the spiritual court for tithes, that the abbot and all his predecessors before and at the time of the dissolution held the land discharged of tithes by reason of unity of possession. *Calthorpe* moved that this surmise need not be proved within the statute of 2 & 3 E. 6. for that statute does not require the surmise to be proved unless the cause be determinable in the spiritual court for non-proof of it, and this case is not determinable there by the express words of the statute. [*Quere hoc*, for I do not understand him.] Besides, it is impossible to swear that the land was discharged of tithes for the infinite search of records that must be made before that can be known, and also for the infinite compositions and other causes of discharge; and for that reason the general allegation of unity of possession shall be sufficient without shewing how it was, as appears from the *Archbishop of Canterbury's* case, 2 Rep. But the court were against him; for though precise proof cannot be made, yet the party may swear that it has been ever since the statute of 31 H. 8. reputed to be discharged by unity, or that he has heard

Supra 189.

(a) The case of *Chester* mill.
 (b) The editor has allowed this case as containing much curious learning to remain. The stat. 57 Geo. 3. c. 99. has so far regulated ecclesiastical residence, that *qui tam* actions on penalties for

non-residence are now extremely rare, if not discontinued altogether, it has therefore been deemed unnecessary to insert some early cases of this description on the statute 21 Hen. 8. c. 13.

(c) Cap. 13. sect. 14.

it commonly to be so, or the like. And *Dodderidge* said, that he had known several precedents in this court of proof made in that manner.

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Linge v. Gunter. [MSS. Calthorpe.]

A PROHIBITION having been granted upon a surmise of a *modus decimandi*, pending that surmise in plea, and before the trial of it, the parson libelled for tithes in kind of the same lands for another year; and upon an affidavit being made thereof an attachment was granted. For it was a contempt of court to proceed in the spiritual court for the same tithes, before the prohibition was tried. In *F. N. B.* 71. if the lord distrain for rent arrear at another day than that for which the first distress was made, pending the plea of *hors de son fee*; the tenant shall have a recaption, because the lord's title is to be tried; and upon that recaption the lord shall be fined. And an order was made, without any prohibition being granted, to stay the proceedings in the spiritual court upon the libel for these tithes.

Pending a suit in prohibition upon suggestion of a *modus*, there can be no suit in the spiritual court for tithes subsequently accrued.

H. 17 Ja. A. D. 1620. B. R.

Johnson v. Bois. [MSS. Calthorpe.]

A PROHIBITION being founded upon a surmise, that a great liberty within the county of *Surrey* had been discharged from the payment of tithes time whereof, &c. a consultation was awarded: for a prescription *in non decimando* is against common right; and though the *Weald of Sussex*, or an entire country may prescribe *in non decimando*, yet such prescription cannot be allowed to a particular liberty, (a) of what extent soever it may be.

A liberty cannot prescribe *in non decimando*.

H. 17 Ja. A. D. 1620. B. R.

Porter v. Bathurst. [2 Ro. Rep. 142.]

It was found by a special verdict in prohibition, that the abbey of *Robertsbridge* was of the order of *Cistertians*, who, by reason of their order, were discharged of the tithes of all their lands *dum in propriis manibus existunt*: that the abbey was dissolved by the statute of 31 H. 8. and that the land now in question was at the time of the dissolution leased for years by the abbot, and that at that time also the lessee paid tithes: that the lease afterwards expired: that the land was conveyed to sir *Henry Sidney*, and from him descended to the earl of *Leicester*, who in the 7th of Ja. sold it to

Though lands belonging to a *Cistercian* abbey were in lease at the time of the dissolution, and the lessee then paid tithes, yet that will not deprive

(a) *Hicks v. Woodeson*, 4 Mod. 336. *infra*, 550. Degge, P.C. part 2. cha. 16. Doct. & Stud. Di. 2. cha. 55.

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Bathurst.

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emption.
Cro. Ja.
589.
Palm. 118.
& C.

Porter : that the rectory of *L.* in which vill the land is situated is appropriated to the dean and chapter of *Rochester*, who granted a lease of it to *Bathurst*, and he libelled in the court christian against *Porter* for tithes, who upon the above matter obtained a prohibition.

Anscombe argued for the plaintiff, and said that this is a personal discharge in respect of the order of *Cisterians*, as was agreed in 11 *Ja.* in C. B. in *Boyer's* case; and though a personal privilege shall not be transferred by the general words of a statute, as appears by *Inglefield's* case, 7 *Rep.* and in the *Marquis of Winchester's* case, 3 *Rep.* yet it may be by special words, as here in our case it is enacted by the statute of 31 *H. 8.* that "the king shall have, hold, &c. the lands, &c. as free and absolute as the abbots, &c. held" and had them;" by reason of which words, though the privilege is not constant and continually in being, but only when the lands shall be in the hands of the abbey, yet the king, and those claiming under him, shall be discharged of tithes. But it may be objected, that the words of the statute are, that "the king shall have, &c. as free, &c. as the abbot had and held them;" and here in our case the abbot could not be said to have them, inasmuch as the lessee of the abbot paid tithes. I answer, that the abbot held the inheritance discharged, though the lessee paid the tithes; and the statute hath respect and consideration to the inheritance, and not to the particular estate; and one may be said to have and to hold, though he have only a right; as a disseisee shall be in ward by reason of his tenure. And as to the *Archbishop of Canterbury's* case, 2 *Rep.* where it is holden, that if the lessees or the farmers paid tithes at the time of the dissolution, that shall not be said to be a unity of possession, which must be constant and perpetual, as 11 *Co. Priddle* and *Napier's* case; that does not apply; for the present is a case of a personal discharge. *Quod fuit concessum* by *Montague C. J. Dodderidge* and *Houghton J.* And *Dodderidge* said, that it was agreed (a) in *Boyer's* case, before cited, that the lands which belonged to the Hospitallers are discharged of tithes, though they were in lease at the time of their dissolution; and yet they were not dissolved by the statute of 31 *H. 8.* but by a special statute made in 32 *H. 8.* And *Montague C. J.* said, that there are other words in the statute of 31 *H. 8.* viz. that the king and all others claiming under him shall hold according to their title, and shall hold the land discharged of tithes; and here in this case *Porter's* title is derived out of the inheritance, which the abbot had discharged of tithes, and therefore *Porter* shall have it discharged also. (b)

Supra 189.

Supra 236.

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(a) Vide infra Sir W. Jones's Report of the case of *Whitton* and *Weston*.

(b) *Benton v. Trot*, Mo. 523. supra, 308. *Wright v. Gerard* and *Hilderstem*, Hob. 306. infra, 375.

P. 18 Ja. A. D. 1620. B. R.

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Sir Edward Coke's Case. [2 Ro. Rep. 161.]

Sir Edward Coke's Case.

IN a case between the lessees of sir Edward Coke and the earl of Warwick, it was agreed by the court and the counsel for both parties, that if one has a portion of tithes out of a rectory, and afterwards purchases the rectory, that by this the portion of tithes is not extinct, but remains grantable. And Houghton J. gave this reason for it, viz. for that the portion of tithes might be more ancient than the rectory, and that the rector of ancient time had no title to the tithes; for before the council of Lateran, every one might pay his tithes to whom he would. And Montague C. J. said, that it was a position in the time of king John, that one ecclesiastical and spiritual man shall not pay tithes to another ecclesiastical man, for *ecclesia ecclesiæ decimas solvere non debet*; and the case at bar was the case of an ecclesiastical person, viz. of a prior who had the portion of tithes, and also the rectory. (b)

A portion of tithes will not become extinct by vesting in the same hands with the rectory.

In this case Coventry said, that it was affirmed in Barsdale and Smith's case that where a vicarage was endowed *de omnibus decimis garbarum*, that that includes hay: and all the judges said, that that case was aided by a custom, viz. that the vicar had always after the endowment used to have tithe-hay, and that was the true case.

Supra 207.

M. 18 Ja. A. D. 1620. C. B.

Wright v. Gerrard and Hildersham. [Hob. 306.]

THE plaintiff declares in prohibition, that Richard Stowden, the last prior of the monastery of Hatfield, and his predecessors were, time out of mind, seised as well of the rectory of Hatfield, as of a certain farm there, called Downhall Farm, in his demeane as of fee, and by reason thereof did enjoy the said lands discharged of tithes; and then recites the statute of 27 H. 8. for dissolution of abbies, and that the said priory was under two hundred pounds *per annum*, and that by virtue of that statute king H. 8. was seised, *simul et semel* of the said parsonage and lands discharged of tithes; and that the abbess of Barking was seised of the manor of Litlington, and she so seised, Nov. 3d, 29 H. 8. conveyed the manor of Litlington to H. 8. and king H. 8. conveyed the said lands, called Downhall Farm, and the said rectory to the abbess of Barking; by virtue of which conveyance she was thereof seised, (and then speaks not of

Monasteries which came to the crown by the statute of 27 H. 8. are not within the privilege of 31 H. 8. and therefore where the prior of Hatfield was seised [376] of lands and a rectory time immemorial in right of

infra, 373. *Cowley v. Keys*, *infra*, 1308. See reported to be relied on. *Claill v. Oram*, *infra*, in Cro. Jac. 559. the editor's note, in which 1354. it is said that in *Bennison v. Smith*, 2 Geo. 3. (b) See *Davis v. Duppa*, 4 Wood, 256. Lord v. Turk was held to be too inaccurately

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the priory which was dissolved by 27 H. 8. and the king held the priory in his hands for a year, and then in 28 H. 8. granted it to the abbey of *Barking*, which was dissolved by 31 H. 8. and the lands and rectory were afterwards severed; the lands are not entitled to the benefit of the statute of 31 H. 8. 1 Jon. 2. Cro. Ja. 607. *Winch's Entr.* 642. S. C.

the discharge of tithes), and 14th Nov. 31 H. 8. she surrendered them again together with the whole monastery to H. 8. and then recites that one only clause of the statute of 31 H. 8. for the enjoying of abbey lands discharged of tithes; and that by force of the grant of the abbess of *Barking* and of the said statute K. H. 8. was seised of the said lands discharged of tithes: and he being so seised granted the same to *William Barns*, and others; and brings down the title of the land to one *Glascocke*, and the plaintiff by lease; and then recites the statute of 32 H. 8. and 2 E. 6. that none should be compelled to pay tithes for lands discharged of tithes, and that though the said farm and lands were discharged of tithes, &c. that yet the defendants sued *Glascocke* and him for tithes, &c. that *Glascocke* died, hanging the suit there, and that he pleaded *ut supra* there, &c.

Whereupon the defendant by protestation denying the unity by prescription in the prior of *Hatfield*, demurs upon the declaration, and prays consultation.

The plaintiff joins in demurrer, and prays that no consultation be granted. It seems his prayer should be, that the prohibition should stand. But either is well enough.

The case in short is thus. The prior of *Hatfield* and his predecessors, time out of mind, were seised of the parsonage of *Hatfield*, and a farm in the same parish, called *Downhall Farm*, together.

The priory being under two hundred pounds *per annum*, was given to the king by the statute of 27 H. 8. the king gives the parsonage and farm to the abbess of *Barking*; the abbess surrenders all to the king. The question is, whether the king and those that claim under him shall hold this farm discharged of tithes, by force of the perpetual unity?

And it was adjudged against the plaintiff, and a consultation granted, by the uniform consent (a) of all the judges.

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This case doth consist of two great points, as they arise in order of time.

The first great point.

The first great point is, whether as this case is, and as it is pleaded, this land ought to be discharged of tithes, though it had come to the king only by the statute of 31 H. 8. that is to say,

(a) It appears from Sir William Jones's report of this case, which is adopted by *Croke*, that this judgement was not given with the uniform consent of all the judges; for that Mr. Justice *Warburton* differed from the other three judges; and held, that appropriations were not given to the king by the statute of 27 H. 8. and that to supply that defect the statute of 31 H. 8. was made; and, therefore, that the appropriations being given

by the statute of 31 H. 8. the discharge extends to them. He held also, that the intent of the statute of 31 H. 8. was to give equal discharge to the one as to the other, as well to the land given by the statute of 27 H. 8. as to the land given by 31 H. 8. And that upon that reason was the case of the land of the prior of *St. John's of Jerusalem* in 10 *Elizabeth Dy.*

that it had never come to the prioress of *Barking*, by reason whereof and of her surrender it was vested in the king by the statute of 31 *H. 8.*

And I am of opinion, that in that case they had not been discharged.

The second great point is, whether upon the whole matter, and the consideration of a double means whereby it came to the king, viz. by 27 *H. 8.* from *Hatfield*, and by 31 *H. 8.* from *Barking*, and upon consideration of both these statutes, this land ought to be discharged by this unity of tithes. And I am of opinion that it is not discharged.

Now the first great point I subdivide into four petty points, which all conclude to the judgement of the first great point.

First, whether the appropriation in this case came to the king, and remained in him a parsonage appropriated by force of the statute of 27 *H. 8.* only, as well as the like appropriations did by the other statute of 31 *H. 8.*

And I am of opinion, that it came to the king appropriate, and so remained in him, by force of that statute only: for if it were not so, the appropriation had been dissolved *ipso facto* by the dissolution of that abbey, and so had not come to the king, nor to the abbess of *Barking* from the king, nor from her again to the king.

The second point, whether unity of parsonage appropriate and the land, and having been in a small abbey time out of mind, (as in this case it was), and so coming to the king by the statute of 27 *H. 8.* only, doth work a discharge of payment of tithes.

And I am of opinion that it will not. Wherein we will speak of discharges of tithes in general within that law of 27 *H. 8.* which stand clear with that law, and which not.

The third point: whether the clause of discharge of payment of tithes, contained in the statute of 31 *H. 8.* can be extended to the small abbeys and their lands, which came to the king by the statute of 27 *H. 8.* only, or not. [378]

And I am of opinion that it cannot be extended to them.

The fourth point, as this case is pleaded, that is to say, repeating only the clause of the statute 21 *H. 8.* that gives the discharge of payment of tithes, without mentioning either the preamble, or any of the other clauses that refer and restrain that statute to those abbeys that came to the king after the 4th of *February*, 27 *H. 8.* which excludes this abbey. So that now this clause may seem as general to the court in meaning, as it is in letter, so that it may comprehend as well those abbeys that came by the statute of 27 *H. 8.* and so before the 4th of *February*, &c. as well as after, whether now the court shall judge upon that clause of the statute of 31 *H. 8.* only, without taking knowledge of the other parts of the said sta-

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tute, which gives the clause another construction, than by itself alone it should have.

And I am of opinion, that the court shall take notice of the whole statute (though part be omitted material) and judge accordingly. And that therefore if it had not come by *Barking*, and so within the statute of 31 *H. 8.* the court could not relieve it by this clause, as general to all abbies, by the advantage of the generality of the clause (as it is delivered in pleading), so this point is handled, as though it had not appeared to come to the king by *Barking*, *scilicet* by 31 *H. 8.* but only by 27 *H. 8.* because as the clause is general, it seems to benefit both alike, as well those that come by the 27 as 31 *H. 8.* though in truth, and upon the consideration of the whole statute of 31 *H. 8.* it doth not so.

Now to the first point, or question of the first great point.

To the first
great point,
the first
petty ques-
tion where-
of.

It is true, that appropriations are not regularly grantable over, neither can they endure longer than the bodies whereunto they were first appropriate; whereof the reasons are, because they carry not only the glebe, and tithes (which they might grant away), but they also give the spiritual function, and make the parsons of the church, and supply institution and induction, which being the highest parts of trust, cannot be estranged, and therefore the instrument of appropriation runs in these words, that they and their successors (not their assigns) shall be parsons, or by *periphrasis* hold the church in proper use. Now yet, by parliament, appropriation may be translated. But the question is, whether the act of 27. gave them to the king. Against which it is objected, that the statute hath not the word of appropriation; which, in a thing of so singular nature, and so fixed to one certain body, in point of care and function, shall not be taken within the meaning of the law, without some perfect and proper word to carry it.

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Supra 189.

Secondly, the opinion in the bishop of *Canterbury's* case, *Co. lib. 2. fol. 47.* is objected, that all impropriations had been dissolved upon 31 *H. 8.* if the clause of discharge in that statute had not been. To this an answer hath been endeavoured, that the statute gives to the king their tithes and their land which carry their glebes, which is the whole parsonage say they; but I allow not this answer. For these words may well be taken for common lands; and tithes, for portions of tithes divided from the pastoral charge: for it shall never be understood that the appropriation should be dissolved, and the church made presentative, and yet, by the same statute, both glebes and tithes should be taken from the church, and given to the king. For this were as much as is said of *Julian* the apostate, that he did *occidere, non presbyteros, sed presbyterium.*

But I hold, that appropriations are well given to the king; and

that by a word proper enough. For the statute gives (*inter alia*) the churches, chapels, advowsons, and patronages of such monasteries (which must be understood their churches), as they were in them, either appropriate, where they were so; or their advowsons, where they were not: otherwise it were a mere tautologism. *Fitzh. N. Br.* 32. *G. ecclesia et rectoria* are *synonyma*; and words of appropriating are, that they may hold *ecclesiam et rectoriam in proprios usus*, as *Grendon's* case is. Again, this statute gives all those monasteries whereof the possession did not exceed 200*l. per annum*; so whatsoever made to that yearly revenue was meant to be given to the king. And it was notorious, that a great part of their yearly profits did consist in appropriations; for it was easy for them to get advowsons, and as easy to get them appropriate.

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Supra 136.

Also, it was the clear purpose of the statute to give the king all that those abbies had, and therefore the saving doth exclude the founders, patrons, donors, &c. But, if the appropriation should be dissolved, the giver should be restored to his patronage; and *Priddle's* case, *Co. lib.* 11. 13. says, that appropriations in reputation passed both by the statutes of 27 & 31 *H. 8.*

Supra 236.

Also note, that the statute 31 *H. 8.* recites the surrender before made of divers abbies, and *inter alia*, so all their churches, chapels, advowsons, patronages, (and names not appropriations there), but in the purview gives appropriations by name, *in majorem cautelam*, as being granted before in true meaning; though it is true, that such grants or surrenders without the statute would not have carried appropriations. Therefore by the word "churches," the appropriations were conceived to be granted; and so settled by the statute: and therefore the pleading is, *virtute sursum redditionis præd. ac vigore stat. &c.* For the statute gives not in intent, but vests only, saving this special case, which I note, because it is a singular case.

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And upon this I observe further, that all the appropriations of abbies that were surrendered between 27 & 31 *H. 8.* were *ipso facto* dissolved, with the dissolution of the corporation, and were presentable and might have new incumbents. But as soon as the statute of 31 *H. 8.* came, the appropriations were restored, and given to the king, and the incumbent ousted.

And touching the opinion before mentioned, I wonder from whence it sprang; for since the body of the statute of 31 *H. 8.* gives appropriations by name, what needs the other clause for that purpose? and if a bye-clause can do it, why should not the main body? So that conceit is vain.

Now to the second point, or question, of the first great point. This statute hath no clause for discharge of payment of tithes, as that of 31 *H. 8.* hath, neither any thing to give colour to it, other

Second
petty ques-
tion of the
first great
point.

1620. than the clause, that the king shall have the lands, &c. in as large and ample manner as the abbots held the same.

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Now there are five ways or means whereby abbey lands are holden discharged of tithes, that is to say, composition, bull or canon, order, prescription of discharge, and unity of possession of parsonage and land time out of mind together, without payment of tithes. Of these five the four first discharges the abbots themselves had, or might have them; but the fifth was no discharge in the hands of the abbots, but it made a discharge of payment of tithes to the king, and those that claim under him by the favourable construction of that clause of 31 H. 8. for so much as that clause extends to; which opinion was long controverted, being confessed of all hands, that it was no full and perfect discharge in law: so then it follows, that these lands can receive no good by this unity, unless they be within the relief of that clause of 31. whereof we shall speak hereafter.

[381] Now of the other four: The first three, that is, composition, bull or canon, and order, were granted and affixed unto the body of the monastery, and were granted unto them as personal privileges, in respect of their spiritual abilities or functions, and their capacity of tithes, and discharge of tithes for that cause: and therefore these had all vanished and expired with the dissolution of the body, if they had not been preserved to the king and his patentees by that clause. But discharge of tithes of the lands of monasteries by prescription is of another nature; for having been always (as prescription presumes) in spiritual hands, the law judgeth that it was never charged with tithe: as the pleading is, that the lands were *immunes a solutione decimarum negative, non privative, scilicet*, uncharged, not discharged, as if they had been once chargeable. The reason whereof was, that being spiritual persons, they were able to minister to themselves spiritual rights, and therefore performing *officium*, they might retain *beneficium*. And this non-charge standing upon prescription was inherent to the land, not as a thing given, but as a *non ens*; lands that never yielded tithe, and land of the little monasteries, so free of tithes, the king by the statute of 27 H. 8. and his patentees, were to hold free, not by reason of any privilege, which did need to be preserved by any statute, but ever by the grant of the land by any kind of conveyance.

And therefore though I said, that discharge of bull or composition was to die with the corporation, yet, if it were once run out time out of mind, it was then to be pleaded and used as a non-charge, by prescription, which was a title of discharge by the temporal law; and if it were impugned, it was to be drawn by prohibition to a trial at the common law, and this without the help of any statute. And therefore in the bishop of *Winchester's* case, it was

resolved, that the bishop holding lands of his bishoprick, discharged of tithes by prescription, his farmer being a layman, shall have a prohibition for his discharge; and so shall the bishop have himself, though he be a spiritual person. And yet bishopricks and their lands are, in point of discharge of tithes at the common law, out of all statutes. So then, the conclusion is, that of the five ways of discharge of tithes, three, that is to say, order, composition, bull or canon, are preserved and kept alive by the clause of discharge in the statute of 31 H. 8. and a fourth, which is unity, is created by that branch; and the fifth, which is prescription, stands by the common law, and hath no need nor use of any statute.

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sham.

Now to the third question of the first great point: The lands of the small abbies coming to the king by the statute made at the parliament holden *February 4, 27 H. 8.* cannot be aided by the discharge of tithes in the statute of 31 H. 8. For first, all the small abbies shall be said to be in the king the first day of the parliament, *scilicet Feb. 4,* according to the rule of 33 H. 8. because acts take effect from the first day of the parliament.

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petty ques-
tion of the
first great
point.

Then take the whole statute of 31 H. 8. and you shall find that the monasteries therein mentioned, are divided, both in the preamble, purviews, and other branches, into those that come to the king since (that is after) 4th *Feb. 27 H. 8.* as it were *de industria*, to exclude the little monasteries given by that statute, and that those should come to the king after the statute of 31 H. 8.

And so he proceeds in that clause, that puts them in the survey of the court of augmentations, and in the other clauses always uses the said late abbies which restrains them; and even in this clause of discharge, though there is in the body "any monasteries" indefinite, yet the preamble of that clause recites "where divers of the said abbies enjoy their lands discharged of payment of tithes: be it therefore, &c. that the king, &c. shall hold discharged of tithes as the said late abbots, &c. did;" so the preamble is plainly restrained to the abbies in that law, and the purview "be it therefore" depends upon the reason of the preamble; and "the said abbots" in the conclusion, reduceth it to this, that the land of any monasteries shall be holden discharged as the said abbots (*scilicet* mentioned in this law) held them; and this case is in effect judged in the bishop of *Canterbury's* case, where it is judged, that lands of a chantry coming to the crown by the statute of 1 E. 6. are not within the relief of this clause for three reasons.

Supra 189.

First, that a branch of a statute shall not be taken larger than the body.

Secondly, that chantries being in the king by one act of parliament, shall not be judged in him by another.

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sham.

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petty ques-
tion of the
first great
point.

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Thirdly, that the form of pleading was never so, that the king was seised by force of both acts: all which fits this case. And yet more (as hath been said) the lands of 27 *H. 8.* are by express terms excluded out of the statute of 31., which is not so in *Canterbury's* case, and so 10 *Eliz. Dy.* 341. for the point of leases.

Now to the fourth question of the first great point: If this had been a particular statute, whereof the court could take no other * knowledge but as it was pleaded, this clause must have been taken generally for all monastery lands; because there was nothing in the plea that restrains the generality of the words, and the defendant might at his choice either plead that there was no such act of parliament, or might shew the farther additions, and that in another term: as, if a man should plead a devise to him and his heirs, and the devise indeed is so in words, but then goes on, and adds, that if he die without issue, it shall remain over, the adversary may either traverse the devise generally, or shew the addition; but being a general law, the court may take knowledge of the whole. But then, though it be a general law, if it be mis-recited, the court shall take knowledge of it, as it is resolved in *Partridge and Croker's* case, *Plowd.* 84. and lord *Cornwel's* case, *Co. lib. 4. fol.* 14. But note in the first of those cases, the statute was pleaded made at a parliament, when there was no such parliament; and in the other the substance of the statute was mis-recited; so both appeared to the court false. But in this case there is nothing pleaded false, but only there is an omission of some part of the statute that may give another sense to this clause.

Now then this being a general law, there was no need to plead it, nor any part of it, no more than when you plead a feoffment to uses, to say that *virtute cujus et vigore statuti de usubus, &c.* though the use of pleading be so; for when you have laid down the case, the court, in general statutes, makes application of the law without your help. So then, since he hath in this case recited some part of the law, which he needed not have done, and that truly; you shall not require at his hands to repeat either the whole law, preamble and all, or at his peril to cull out all parts that are material to give construction to that part that he pleads; for that is the office of the court, and not of the party.

The second
great point

Now to the second great point of the case, the judges must be very considerate, not to extend the discharge of tithes, by way of unity, beyond the bounds whereof it hath gotten possession; for divers reasons.

First, It is no friend to religion; for, it takes away the nourishment and reward of learning, and industry of churchmen.

Secondly, It is against common right, and the common law of *England*; for according to them it is no discharge.

Thirdly, It is an accroachment, even beyond the usurped authority of the see of *Rome*, by which it was no discharge.

* Fourthly, It was such a bear's whelp, as it was an age before it would be brought in any shape, and yet when all was done, it was cast into a form of pleading which departs from the rules of all art of reasoning: for it is pleaded thus, for example: The prior of *Hatfield*, &c. time out of mind, was seised of the parsonage and land, *simul et semel, et ratione inde* held the land discharged, &c. And yet you may not deny the argument, which must be, that unity by prescription dischargeth, though it be confessed to be false. And if you suppose the *major*, and turn it into a *syllogism*, you are not allowed to deny it so as to demur in law upon it; yet wheresoever such a unity is with a clear non-payment of tithes time out of mind in a body spiritual, capable of a non-charge, it might have been laid as an absolute discharge upon better reason directly, than to lay it upon the unity; for the presumption of a perfect discharge in that case was not doubtful; for in *Priddle's case*, *Co. lib. 11. fol. 14.* it is truly said, that a unity and a perfect discharge by prescription may stand together.

Now then it is agreed, that where the unity is such as is allowed for discharge, it is not so allowed for itself, and of its own strength, but in contemplation of a true discharge, which in such confusion of possessions and privileges of all natures may well be conceived, though it cannot be shewed. Now that presumption fails in this case. For where there are four ways, as hath been said, to discharge abbey lands of tithes; that is to say, order, composition, bull or canon, and prescription; all these may be presumed to maintain the discharge by unity, where the same body of the abbey continued seised, both of the parsonage and the land, from beyond memory, till the statute of 31 *H. 8.* For then that statute, and the clause of discharge thereof, did attach upon it with full advantage. But in this case, which is a novelty, three of these presumptions fail with the priory of *Hatfield*, as hath been said, that in order, composition, and bull or canon.

Now if it be said, that if the abbey of *Hatfield* were discharged by prescription, that that remains; I answer, that if it be so taken, it makes expressly against the plaintiff; for that discharge is sufficient of itself according to the course of the common law, and hath no need of the help of any statute, as hath been said, and therefore cannot be admitted in understanding to maintain a unity, which hath no force but by the statute of 31., for fiction is never admitted where truth may work; as where *cestuy que use*, and his feoffee join in a feoffment, it shall be the feoffment of the feoffee. So, where in *Priddle's case*, it hath been said, that an effectual unity must have four qualities; that is to say, it must be *perpetua, equalis*,

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ston.

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1620. *legitima, et libera*; you must add unto it a fifth, that is, it must continue in the same body: else the presumption of true discharge ceasing loseth its force. And I am of opinion, that, if in this case, the plaintiff should lay the discharge by prescription, the defendant might avoid it by shewing, that the abbey was discharged by order, composition, or bull, within the time of memory, or, at the least, it were a great evidence for him. (a)

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sham.

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Baker v. Cocker. [Hob. 295.]

Lambs of
several
owners
reckoned
together, an
unreason-
able cus-
tom.

PETER Baker, vicar of *Stower Payne*, libelled in the spiritual court for tithe-lambs against *Robert Cocker*, and laid, that there was a custom there, that all lands engendered, fallen, and bred upon any one tenement, or living in the same parish, although they belonged to several owners, have been cast, and reckoned together, as if they were but one man's, and the tenth or tithe-lamb of them so counted together hath been paid for tithe.

Whereupon *Henden* prayed a prohibition, because all customs against common right are triable at the common law. Which was granted. And the court was further of opinion, that the pretended custom was unreasonable and against law: for by this means it might fall out, that some one might have but one lamb, and that might be taken for tithe, and he that had more should pay nothing at all.

M. 18 Ja. A.D. 1620. C. B.

Slade v. Drake. [Hob. 295.]

In a declar-
ation on a
prohibition,
if the plain-
tiff claim an
exemption
under an
abbey, he
must shew
not only
that the
abbot held
the lands
discharged
at the time
of the dis-
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solution,
but also
by what
means, and
in what

ROGER Slade brings a prohibition against *John Drake* esquire, farmer of the rectory of *Arminster*, and declares, that whereas *Richard Gill* late abbot of the monastery of *Newham*, in the county of *Devon*, was seised of a messuage and divers lands, meadow and pasture, parcel of the possessions of that monastery, to the time of the dissolution, in fee; and whereas also the same abbot by himself and his farmers, at the time of the same dissolution, held and enjoyed the same acquitted and discharged of all manner of tithes; and being so seised, surrendered the same 30 H. 8.; and then recites the clause of discharge of tithes in the statute 31 H. 8. and then brings down the land by descent to queen *Elizabeth*, and from her to the duke of *Norfolk*, and from him to the lord *William Howard*; and that he by indenture enrolled in the chancery, within six months, bargained and sold the same unto the lord *Petre* and his son, 3 Jac. and they demised it unto *Slade* the plaintiff; and

(a) See *Porter v. Bathurst*, *supra*, 373. and the cases cited in the note.

then *Drake* the defendant sued him in the consistory court of the bishop of *Exeter* for tithe of wheat and other grain against the form of the said statute.

Whereupon the defendant demurs in law generally, and prays a consultation.

Upon this case, after solemn argument, judgement was given for the defendant, and a consultation awarded, *Warburton* dissenting.

In the argument of this case, I made two great points.

The first, whether the declaration were good or no? and I held it not good.

The second, whether the fault of the declaration were in the substance, so that advantage might be taken of it upon a general demurrer? and I held the fault substantial. I first professed if my judgement should take counsel of my interest or affection, I should be of another mind; but I was bound within former rules of justice, precedents, religion, and prudence. Justice, *suum cuique tribuere*, tithes to whom tithes belong. Precedent, *stare super semitas antiquas*. Religion, *merito summa habetur ratio, quæ pro religione facit*. Prudence, *quod dubitas, ne feceris. De non apparentibus et non existentibus eadem est ratio*. Now to the first point; *Littleton* says, that pleading is the honourable, commendable, and profitable part of the law, and by good desert it is so; for cases arise by chance, and are many times intricate, confused, and obscured, and are cast into form, and made evident, clear, and easy, both to judge and jury (which are the arbitrators of all causes) by good and fair pleading. So that this is the principal art of law, for pleading is not talking; and therefore it is required that pleading be true; that is the goodness and virtue of pleading; and that it be certain and single, and that is the beauty and grace of pleading.

Therefore the law refuseth double pleading, and negative pregnant, though they be true, because they do inveigle, and not settle the judgement upon one point.

Therefore, first, general pleading is disallowed though it be in matters of fact, as a covenant to make an estate by the advice of *J. S.*, he must shew what advice he gave, 26 *H.* 8. 1. 16 *E.* 4. 9.

Condition that the obligee shall enjoy an office according to a grant of letters patent, he must not plead in *hæc verba*, but he must shew the effect of the letters patent, and the enjoying accordingly.

But because it hath been said, this is a spiritual act (which yet I grant not to be so) he that pleads deposition of an abbot, he shall plead before what ordinary, 9 *E.* 4. 24.

So, debt upon lease of a vicarage, the defendant pleading a sequestration, must shew by what ordinary, for what causes, as

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manner he
held them
so discharg-
ed.

The law
loves single
pleading,
abhors
double.

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for non-residence or the like, and legal process of sequestration, 5 E. 4. 29.

So, union of chapel must be shewed; by whom, *scil.* the pope or bishop; not generally, *concurrentibus iis*, &c. 11 H. 7, 8.

In pleading a divorce, you must shew before whom it was, and set forth the cause of divorce, 11 H. 7. 27.; but all the proceedings you shall not need, as you should of a recovery at the common law, 21 E. 4. And therefore in *Specol's* case, 5 Rep. 57. the bishop cannot plead cause of refusal, *schismaticus inveteratus*: nor upon the statute 4 H. 4. that a man was defamed of heresy. But they must specify the schism or heresy, though they be matters of mere spiritual cognizance. *Vide Dyer*, 8 Eliz. 154. Haunter of taverns, player at unlawful games, *et ob alia diversa crimina criminosus*.

For this is regular for difference between the king's courts and the courts ecclesiastical, that though a spiritual cause cannot originally and primitively fall into the king's court; as for calling a man heretick he shall not have an action of the case, 20 H. 8. yet, if a civil action be well commenced, as in the cases cited, a *quare impedit* or an action of false imprisonment, if any thing fall incidentally, that is spiritual, the king's court shall continue the plea upon it either by jury or demurrer, except in case where the law hath provided trial by ecclesiasticks; as by the issue upon bastardy, *n'unques accouple*, &c. *literature*, and the like: in which cases the bishops are not judges, but ministers of the king's courts as other kind of triers are; whereupon the court proceeds to judgement according to their certificates and trials. But on the contrary, if a case begin well in the spiritual court as being spiritual, and a point fall incidentally, that is of temporal cognizance, it is clean contrary: for the trial is called from them; as in daily experience, in prescription and limits of parishes, in suits of tithes.

Now, if it be a point of discharge that is to be pleaded, as this case is, it must ever be pleaded specially, and shewed to the court, how the discharge is; for it is no discharge if it be not sufficient; and the sufficiency is matter of law, and therefore must be seen and judged by the court; as is 22 F. 4. fol. 40. And *Mansel's* case. Co. lib. 2. fol. 3.

[388] Now, touching the discharging of tithes themselves, and the pleading of them at the common law; it is to be observed, that they are things of common right, and do of right belong unto the church. And therefore though it be true, that before the council of *Lateran*, there were no parishes, nor parish priests that could claim them, but a man might give them to what spiritual person he would; yet to the church he must give them. But since parishes were erected, they are due to the parson, (except in spiritual regular cases), or vicar of the parish; and therefore when you have

a prohibition of discharge of tithes, you must consider it is a plea in bar against common right to a demand of tithes, which is a common right, though they be in several courts, as by a release either in deed or law.

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Now then, if you will discharge a just demand, you must satisfy the court of your discharge. Consider then the kinds of discharge of tithes, the persons capable of them, and the means how.

The persons or bodies capable of them, are either spiritual or temporal.

Temporal I say, when they were temporal, when the discharge did first vest in them; for otherwise if the temporal man succeed a spiritual body in discharge, as upon the statute 31 H. 8. it is to be reckoned in a spiritual person or body, not in a temporal one.

The spiritual person had four ordinary ways of discharge, that is, 1st. bull of the pope: 2dly. composition: 3dly. prescription: and these were absolute: 4thly. order, and that was limited so long as land remained in the manurance of the religious persons themselves; and these were the Cistercians, the Templars, and the Hospitallers, or Hierusalomitans: but unity of possession of the parsonage appropriate and the land tithable was no discharge, nor so holden at the common law; but how that came into use, and upon what reasons, and with what cautions, and how to be deducted in pleading, I shall speak after when I come to the statute of 31 H. 8.

Discharge
of tithes.

Now, clearly, at the common law, the spiritual person could not claim his discharge by bull, composition, or order; but he must plead it with his ground and reason specially; but his discharge by prescription was allowed him without any other reason, because he was a person capable of such discharge. And so the original was probable, and therefore the prescription was allowed him as in other cases immemorial whereof the original cannot be found, but is ever presumed just.

Now temporal persons (not to speak of the king, which was a special case, 22 Assise) had two ways to obtain tithes, or to discharge tithes; the first was by grant of the parson, patron, or ordinary; the other was by a prescription; but that was ever, not *prescriptio simplex*, but *composita*, not a prescription single, but compounded, differing from the case of the spiritual person. And so is *Pigot and Heron's case*. And so are the common cases, where men have the discharge of tithes in kind by paying composition for them in money or land or pension, held or enjoyed by parsons and vicars in lieu of them, 8. E. 4. F. N. B. &c.

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But now note a strange *anomalum* in this case, tithes differing from all other cases in law.

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For whereas prescription and antiquity of time fortify all other titles, and suppose the best beginning that law can give them: in this case it works clean contrary. For whereas a grant of a parson, patron, and ordinary is good of itself without any recompence or consideration; when it runs out to prescription, it dies and perishes; whereof no other reason is given, but that our books say that a man may prescribe in *modo decimandi*, but not in *non decimando*: and this is in *favorem ecclesie*, lest lay-men should spoil the church.

But I will make another reason not dissonant from law.

There are presumptions of law so violent, as though they be false, a man should not be received to aver against them; as, in a *precipe*, the tenant pleaded himself villein to T. S. and that he hath nothing but his villenage; the demandant had no reply, though it were false, but his writ must needs abate, till the statute 37 E. 3. did admit the counterplea; *Mansel's case*, and 16 H. 7. So in replevin, if upon avowry the tenant disclaims, he shall have judgement, though it be false: for the law believes, that these parties will not do themselves wrong in so high a degree. The like reason moves in this case: the law presumes violently that a layman cannot be absolutely discharged of tithes; and therefore will not allow a prescription of such discharge; holding it more reasonable, that some one man should suffer a mischief to lose such a privilege, being so improbable and of so dangerous consequence, than for his particular to admit a spoil of the church and a decay of religion, according to the rule, *omne magnum exemplum aliquid habet ex iniquo, quod publicâ utilitate compensatur*.

So, though you shall be allowed your discharge by grant when it appears, yet when it appears not, *stabitur præsumptioni donec probetur in contrarium*.

Now the common law, as touching the discharge of tithes, and the forms of pleading it, standing thus; the next question is, what change the statute of 31 H. 8. of monasteries hath made in that behalf?

And I am of opinion that it hath made two main changes.

[390] The first, that it hath by force of the clause of discharge preserved and continued certain discharges that were before the statute, that is, by bull, composition, and order, and conveyed them over to the king and lay persons, which else would have vanished and dissolved with the spiritual bodies themselves, whereunto they were annexed.

The next is, that it hath created and made one new discharge which was not before at the common law, that is, the unity of the possession of the parsonage and the land tithable in one hand.

And this was long controverted; but now is a received opinion by

the determination of the king's courts to be *de lege*, a discharge within the meaning of the law; as the divines say, that articles are made *de fide*, by the determination of the church.

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But in this case of unity, four things are to be observed :

First, that it is no discharge of tithes but (as it is well observed) a discharge of the payment of tithes; and, therefore, if it be pleaded by way of discharge generally, and the jury find nothing but a perpetual unity, it is found against the pleader; and so much is agreed in *Priddle* and *Napier's* case.

Supra 236.

It is no discharge, except it be by prescription.

If it be perpetual, yet, if it be alleged, that the abbot or his farmer paid tithes, that doth destroy the prescription, because that proves that there was no real discharge, but a non-payment by unity only: yet a unity by prescription is good *prima facie*; but not of itself, but in contemplation of a perfect discharge, that shall be supposed, though it cannot be found for the infiniteness and impossibility of search of things beyond memory.

Lastly, though unity perpetual be allowed, yet it is not well pleaded except you had that *ratione inde* they held discharged of payment of tithes time out of mind; for though the unity shall be traversed, and not that conclusion or consequent, yet that conclusion fixeth it to the statute, and answers the real and perfect discharge that is presumed under the unity, to which the unity itself is but augmentative: but yet I am of opinion, it is but a fault in form, which will be cured by a verdict or general demurrer.

This discharge by unity being the only discharge that is created and made of new by this statute, all other discharges are not otherwise preserved but by these words, "that the king, his heirs and successors, and such persons, their heirs and assigns, which shall have and hold them according to their estates and titles, be discharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the said abbot had or held the same [391] at the day of the dissolution of the same."

So, first, it is plain that this clause gives neither new discharges, nor enlarges the old; but continues and bounds them within the limits of those that were enjoyed by the abbot both by word and meaning according to the cases, *tot, tanta, &c.* For though unity (as hath been said) be now used for a discharge, yet it is not so for itself, but for a more perfect, which is presumed, though it appears not.

Now this being the substance and body of this clause in word and meaning, it is strange it should be moved, that out of this clause may be drawn a conceit of a liberty given to the possessors of abbey lands, to plead their discharges in other form, and with more gene-

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reality and favour, than the abbots themselves had in those cases: against which the reasons are many.

First, the word is expressly touching the having and holding of them, not a touch nor a glance of the pleading of them, which is merely *heterogeneum*.

Secondly, if these words should be extended to pleading it would turn expressly against them; for then it must be understood, that they shall have the benefit of pleading in as large and ample manner as the abbots had. Which implies a negative, that it shall be in no other nor larger manner; for the rule is, that affirmatives in statutes that introduce new laws, imply a negative of all that is not in the purview.

And therefore in *Amy Townsend's* case, *Plow.* 111. it is adjudged, as it hath been since, that where one comes to a possession by a use out of an estate discontinued, so that the entry was not lawful to the *cestui que use*, such a possession works no remitter, because the statute appoints the possession in the same manner and form (which imports a negative), and no other as are in use.

So the statute *Westm.* 2. appoints that the demandant in a *quod ei deforceat* may vouch *ac si esset tenens*; if in the first action he could not vouch (as if it were a *scire fac.*), then cannot he vouch in the *quod ei deforceat*, being demandant, 14 *H.* 7. 18.

Thirdly, if you shall admit this exposition upon this clause, you must admit it also upon the body of the law, upon the like words, which are thus: "the king shall have and hold, to him, his heirs and successors, all monasteries, and all their lands, tenements, rents, &c. and in as large and ample manner as the abbots had the same at the time of the dissolution;" so then it shall suffice to plead, that the abbot was seised of a rent charge out of my land at the time of the dissolution, &c. without shewing any other title. And so of other statutes; and this kind of pleading hath the same pretence of loss of writings, of grants, of rents, reversions, and the like, and infiniteness of search, and more than the case of bulls and the like.

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4. This form of pleading that lies so open and obvious in the words of the statute, and was so easy and pleasing to them that sought discharge, was never to this day amongst so many busy wits ever offered in any authentical pleading, much less received the least allowance, by the opinion of any learned or grave man; but the contrary, by the specification of the discharges, except in the case of prescription; and yet in the case of unity, though it be by prescription, it is also specified.

5. Lastly, this were to take a statute contrary to the common law, which trusted not laymen with their prescriptions, and yet now

you will trust them without prescription, with that that belongs to the court to judge. And this is against a main rule in expounding statutes, especially in *odiosis*.

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So no man but can see what absurdities would follow by admitting a change of regular forms of pleading to vulgar speech, used in acts of parliament, to express the meanings which are every day by the judges extended, restrained, and changed according to a better rule of reason and justice than the words bear. And if the words rule not in substance, much less in the forms of pleading, which is the act of law, as hath been said: and this precedent of irregularity of pleading is as ill in consequence as the principle.

So the statute of 4 H. 4. of heresy, before mentioned, was not pleaded as the statute went in general, but the heresy specially assigned.

Now take the statute 34 H. 8. c. 20. that provides, that if the tenant in tail of the gift and provision of the king, suffer a common recovery, the reversion or remainder then being in the king, that such recovery shall not bind the heirs in tail, but that they may enter after the death of the tenant in tail: will any man say that the heir may plead that his ancestor was tenant in tail of the king's provision and reversion or remainder in the crown, when he suffered the recovery?

So, in the case of 11 H. 7. c. 20., if any woman (being tenant in tail of the gift of any of the ancestors of the husband) discontinue, the same shall be void, and it shall be lawful to the person, to whom the interest after the death of the woman shall appertain, to enter: will any man say that it were well pleaded in these words, without shewing how the estate grew, or how the discontinuance was made? and yet he that is to take the benefit may be a stranger to the conveyance, as upon a covenant to raise the use.

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So, upon the statute 32 H. 8. of conditions, these are no mischiefs to the discharges that were before time of memory of all sorts: for they must be maintained and pleaded by prescription, even unity itself may be so. Neither is there any mischief in effect to those discharges, which were created since memory; if they be true, and the original unknown; for they may be both supposed and pleaded by prescription: for they had their effect of discharge, and the prescription cannot be impeached, but by shewing a late original of such discharge, which if the adversary can shew, the party himself may much better: so then there remains no prejudice but in one case, where there can be no reasonable presumption of a lawful discharge, which is, where there cannot possibly be a discharge by prescription, that is, where either the abbey was founded, or the lands were purchased to the abbey since memory, in which case to presume a discharge even to the last times, where there is

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no appearance of it, is as much as to say all abbies have discharges for all their lands; which may be extended even to orders that had discharges thereby for their own manurance; for they might also obtain by bull, or otherwise, general and absolute discharges. And this may be concluded, that if this form of pleading be once received, you shall have all others left, and this only used, which is one of the weightiest reasons that makes me explode it, considering the busy wits, that have used all means to win discharges and forms of pleading to that purpose, and yet never took boldness to offer this. And what needed all the labour about unity by prescription, or without prescription, if they might have pleaded discharges at the time of the dissolution? For it is easy to prove a non-payment, by reason of a unity for any time; and non-payment is the common evidence for the proof of a discharge sufficient, which may be proved when a perpetual unity cannot be.

Discharge in abbots must now be proved *a posteriori*, for no man living can now speak to the time of abbots. As to the case of *Wimbish* and *Talboys* (a), it is no authority; for the judges are divided two to two. Secondly, both parties pleaded there, *viz.* covin and deceit were matter of fact.

And as to the case of *Strata Marcella* (b), that is no authority at all; for no judge speaks a word to that point, and the judgment passeth against him that pleaded so. But that indeed was upon another reason and point. And as to *Coke's* opinion in this case of the bishop of *Canterbury*, lib. 2. 48. I answer, first, that the opinion makes not at all to the judgement of the case, to say that by the statute 31 such a discharge may be pleaded.

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Supra 189.

Next, it is no part of the resolution of the court, but an addition of his own, and that sudden and interposed.

Thirdly, it is so imperfectly set down, that the prior, &c. so it may be the prior and his predecessors.

And as to such an allegation being commonly used in prohibitions; this argues plainly, that either he mistook the practice, or the book mistook him, (which I rather believe,) which is made the ground of his opinion: for there is no authentical precedent, much less judgement or grave opinion to that purpose.

Supra 167.

Supra 236.

And again that case of *Winchester*, in the same book, fol. 44. being both 38 *Elizabeth*, *Priddle's* case coming after, 10 *Jac.* in his 11 book fol. 44. he makes these questions, that if any abbey have been time out of mind, and an appropriation since, yet they may prescribe in a general discharge; for that may be though a unity come after. But saith he, if the abbey itself were founded since memory, then he cannot prescribe at all in the general discharge;

(a) Plowd. 38.

(b) 9 Co. Rep. 24.

and so leaves it as a case desperate, where the abbey was founded since memory; which yet he might easily have relieved, if he might plead a discharge; time of the dissolution, without shewing how; which is either a retraction or an explanation of his former report.

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Now to that which was well moved and objected by my brother *Hutton*, that the plaintiff hath not well conveyed to himself the land charged with tithes, I hold that the defendant, notwithstanding that defect, cannot upon the whole matter have a consultation, if the discharge had been well pleaded: for the title of the land is not in question, but whether the land be discharged or no, which any man that is answerable for the tithes may plead, whether he have good title to the land or no; and since the parson in this case hath sued him for the tithe, he hath enabled him to make his defence, either by plea of discharge in the ecclesiastical court, where he needs no title; or by prohibition to the same effect in the king's court, which is in lieu of it, and supposeth that he offered his plea there.

And this is regularly true, that if the prohibition be faulty, yet the defendant shall never have a consultation, if it appear to the court that the suit in the ecclesiastical court was not well founded, as it was there heard, though he might have had a suit in another manner.

And therefore, *M. 1 & 2 Eliz. Dy. 170.*, one sued for tithe corn [395] on sixty acres of ground; the defendant in his prohibition laid that all was barren ground, and paid no tithes; whereupon issue was taken, and the jury found that thirty acres were so, and that the other thirty acres were barren, but yet had paid tithe wool, and lamb. The whole court thought at first a consultation ought to be awarded for that part; but yet upon better advisement, they resolved the contrary; for he had no right to pursue his suit for corn; and by the same reason, if the land be discharged, he ought not to sue any man for the tithes of it, whether he hath title to the land or no.

I hold the declaration grossly faulty in another point, that he hath laid no estate of the discharge of tithes; for he hath not said that *Gill* the abbot was seised of the land in his demesne as of fee discharged of tithes; but hath made it two sentences, that he was seised of the land in fee, at the time of the dissolution discharged of tithes, which may be true, if it were but for that year by grant of parson, patron, or ordinary.

The second great question is, whether the demandant in this case ought to have demurred especially? for the plaintiff hath laid, that the land was discharged, which the defendant by his demurrer may seem to have confessed. But I am of clear opinion, that the general demurrer notwithstanding, the defendant may still take ad-

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vantage of the fault. The words of the statute are, that the judges shall proceed, and give judgement according as to the very right of the cause and matter in law shall appear unto them : so right is as no right, if it appear not to the court, as we proved in the case of *Heard* and *Baskerville*, that the not shewing of a deed, or not producing the letters testamentary, or of administration, or not laying a place of *visne*, is not remedied by general demurrer.

[Upon this judgement a writ of error was brought, and the case was argued three several times in the court of king's bench ; 1st. by *Bridgeman* for the plaintiff in error, and *Calthorpe* for the defendant ; next, by *George Croke* for the plaintiff, and *Jermyn* for the defendant ; and thirdly, by *Yelverton* for the plaintiff, and *Dampart* for the defendant. *Calthorpe* has given but a part of his argument, and refers for the residue to a manuscript book of which I have not been able to get possession. I have therefore contented myself with extracting the arguments of *Yelverton* and *Dampart*, as the question seems to have been more fully discussed by *Yelverton* than by either of the counsel who preceded him.] (a)

- [396] *Yelverton*. — It appears by the several clauses of the statute of 31 H. 8. c. 13. that that statute aims rather at a discharge in possession, than in right, and that being so, it will be sufficient in a surmise for a prohibition, to shew a discharge in possession, which is a discharge from the payment of tithes at the time of the dissolution ; and the law will not oblige a man to shew a discharge in right. And that the statute aims only at a discharge in possession will be evident upon considering it : for after reciting that “ divers “ others were discharged of the payment of tithes before the dissolution,” it enacts, that “ all and every such person or persons, “ their heirs and assigns, which have or hereafter shall have any “ monasteries, &c. shall have, hold, and enjoy them, &c. according to their estates and titles, discharged and acquitted of payment of tithes, as freely and in as large and ample manner as “ the said late abbots, &c. held them, &c. at the day of the dissolution :” so that the statute speaks only of a discharge from the payment of tithes, which is merely a possessory discharge, and not a discharge in right ; as we may see by 18 E. 3. *Barre* 247., which takes a difference where a defeasance is for the discharge of an annuity, and where it is for the discharge of payment of an annuity : for in the first case a release must be produced, because

(a) The editor has searched in vain in Mr. *Hargrave's* manuscripts in the *British Museum*, for this argument. It is probably contained in the 3d vol. of Sir *H. Calthorpe's Reports*, which does not appear to form a part of that collection.

The absence of it, however, is the less to be regretted, as the arguments of *Yelverton* and *Dampart* are inserted. There is a short note of the case in *Calthorpe's MSS. Cases in Error*, Bibl. Hargr. No. 34. fol. 302.

it goes to the right: but it will be otherwise in the other case, because it goes only to the payment. By 38 E. 3. 6. it appears, that there is a difference where the right of tithes comes in question, and where the possession: for that in the first case the court will be ousted of jurisdiction, but not in the last. In 13 H. 4. 10. upon a *quo warranto* it is holden, that if the question be of the right, a special answer must be given; but, if it be merely of the possession of the liberties, then it is not necessary to make title.

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2. If the general surmise be not good, and the patentees shall not hold discharged of the payment of tithes according to the possession of the abbey at the time of the dissolution, great mischief will ensue to the purchasers, it being impossible for them to shew the particular discharges of the abbey: for there are six manners of discharge from the payment of tithes, *viz.* by order, by the pope's bulls, by prescription, by composition, by councils, by unity of possession; and some abbeys had one part of their lands discharged one way, and another part another way; and how is it possible for a purchaser to shew the particular discharge amid such a variety? To obviate the mischief that would ensue from this, the statute must receive a favourable exposition, as other statutes of a similar kind have; as in 4 H. 6. 26. *by Martin*, 11 H. 6. 4. *by Newton*, Com. 538. (a) *by Dyer*, where you will see the rule given by the judges for the exposition of statutes, that they are to be so construed as to redress the mischief.

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3. The patentees come in in the *post*, and are not any way privy to the instrument of discharge: and therefore to force them to shew the instrument, where they have not any means of coming at it, nor are any way privy to it, is against reason. And that they are not privy appears by 3 E. 3. *Garrantee* 70. and 35 H. 6. 57., where it is holden, that the Hospitallers, who had the lands of the Templars after their dissolution, should not take a tenure in frankalmoigne, or an appropriation made to the Templars. And it is clear that the king and his patentees come in by the surrender of the abbots, and under them, and not by the statute of 31 H. 8. c. 13., as we may see by *Dy. 3. & Com. Adams's case* (b); and after the surrender of the possessions the corporation remains as it was before, according to the case of *Magdalen College*, in 2 Rep. 77, 78., 20 H. 8. *Br. Extinguishment*, 35., and 32 H. 8. *Br. Corporations*, 78.; and if the corporation remains, the privilege which was personal, and annexed to the corporation, remains with it, and was not in any wise transferred. And although the 31 H. 8. hath a clause for the settling of abbeys in law, yet things annexed in privy will not be transferred by that statute. Which being so, it follows that

(a) Plowden's Reports or Commentaries.

(b) 4 Co. Rep. 96.

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the patentees cannot hold those lands discharged of the payment of tithes, unless it be in respect of a possessory discharge; for the discharge in right, be it by order, bulls, &c. is not transferable.

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4. The prohibition demands nothing, but is only to give jurisdiction to the temporal court, and to stay a suit in court christian: and the law hath at all times been very favourable to the jurisdiction of the temporal courts, that they shall not be ousted of jurisdiction by any nice construction; and therefore in 31 H. 6. 7. we see that before the statute of West. 2. an *indicavit* was grantable at common law, though the suit was for less than a fourth part of the tithes: and after the statute of West. 2. and of *Articuli cleri*, a writ *de advocacione decimarum* was allowed; with which agrees 16 E. 3. *Quare impedit* 147. By 38 E. 3. 13. and F. N. B. 30. a writ of right lies of oblations. By 4 E. 3. 141. it is not necessary to allege esplees in an *indicavit*: and by 18 E. 3. 58. the time of avoidance is triable at common law, and shall not come in upon the bishop's certificate: and by *Fineux*, 10 H. 7. 24. the temporal court shall not be ousted of jurisdiction without special cause shewn. And notwithstanding the statute of 2 & 3 E. 6. does not direct any particular action for the treble value; yet the judges in their exposition of that statute have always holden, that an action of debt is maintainable; and so it was adjudged in 28 Eliz. when the first action of debt was brought upon the statute; and in 40 Eliz. Rot. 699. *Rod and Bede's case*, it was ruled accordingly. And if the law should drive the plaintiff in the prohibition to make a special surmise, then might the court be ousted of jurisdiction, where there was no reason; and further, the judges of the common law might give their judgement upon a papal bull, and upon the validity of a thing which does not belong to their consueance. If too in an action of debt on the statute of 2 & 3 E. 6. where the plaintiff demands the treble value of the tithes, it be sufficient to state that he was *proprietary* generally, without shewing any title, as it hath been adjudged to be; *a fortiori* a general surmise will be sufficient in a prohibition, where nothing is demanded.

5. The statute being general, the surmise may well enough be general: for it is not necessary that the plea should be special, where the statute is general; as we see by 4 H. 7. 8., 26 E. 3. 65., and 9 E. 3. 5. where a general pleading was allowed to be good. And if the plaintiff in prohibition were forced to make a special surmise, then it might happen that he might be forced to found his surmise upon a papal bull; for according to 7 E. 3. 5. and 11 H. 7. 17. the pope might well enough discharge a man from the payment of tithes: but the taking of bulls from the pope was condemned by the common law, as appears by the book of

30 *Ass. pl.* 18. and 11 *H.* 4. 36. and the statute of 25 *H.* 8. is more strict against them. Wherefore to avoid this inconvenience the plaintiff in prohibition shall not be driven to make a special surmise.

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6. The plaintiff in prohibition shall not be obliged to suggest more than the defendant is bound to answer to; and there being some discharges, which are not traversable, as the discharges by union and by order; it is not necessary that they should be shewn specially.

7. This discharge from the payment of tithes being by act of parliament, it must of necessity relate to the statute of 31 *H.* 8. for there is no other parliamentary discharge: and a special surmise is the less requisite in the case at bar, because the prohibition is now debated in the king's bench, which court has greater power (a) [399] in the granting of prohibitions than the common pleas has, according to 18 *Eliz. Dy.* 349. And as to what has been objected, that the statute is not general, but that it is, that the patentee shall hold as freely as the other abbots did; I answer, that this clause was inserted for the security of purchasers, and in respect of the quantity and quality of their estate, for by this clause the purchasers hold as freely as the abbots held; for which reason it was adjudged in one *Bradstock's case*, 24 *Eliz.* that a common, which was extinguished by unity of possession in the hands of a prior, should not be revived upon severance of the land to which the common is appendant, and the land where the common was taken. And if the tenancy escheat, the patentee shall have as great an estate in the tenancy as he had in the seigniori. 2. The clause was inserted for equality of justice; because, without this clause those who had annuities in respect of their tithes (and there were many according to the books of 11 *H.* 4. 6 & 8., 9 *H.* 4. 19., 16 *E.* 3. *Annuity* 24. 29 *E.* 3. *Grant*, 103. and 3 *H.* 7. 14.) could not have had those annuities after the dissolution. 3. The addition of this clause makes the king and his farmers subject to the same justice in this point, as others are subject to; and therefore it was adjudged in *Gerard's case*, 34 *Eliz. B. R.* that a prohibition was grantable as well against the king and his farmers, where they sue for tithes, as against another person. 4. Without this clause there would have been a larger discharge than there ought to have been: for if an abbot had been discharged of all his lauds *exceptis novalibus*, those *novalia* would have been also discharged, but for this clause; and therefore the clause was of necessity to be added in order to make a conformity. As to what has been objected out of the *abbot of*

(a) Sitting as a court of appeal the court of king's bench can exercise no other power than the court of common pleas could have exercised.

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Strala Marcella's case (a), and 20 E. 3. *Avowry* 129., where there was a reference to the liberties of *Northampton*, that those liberties ought to be specially shewn, I answer, that they are matter of record, which may be obtained by search, and for the finding of which there are ample means; but these discharges from the payment of tithes are not any matters of record, but merely matters in *pais*. The discharge too by a bull of the pope is not a thing producible; and 44 E. 3. 32. it appears that the rolls of the bishop are not of record. Where a tenancy escheats, there shall be a discharge from the payment of tithes under the statute of 31 H. 8. because it comes in lieu of the seignior, which was discharged.

Supra 194.
208.

Supra 167.

Damport contra. — There are six manners of discharge: The 1st is by order, as the Cisterians, Templars, and Hospitallers, according to 10 Eliz. Dy. 277. and 2 H. 4. c. 4.; and this discharge is personal, and does not go to the assignee. The 2d is by bull of the pope according to the statute of 2 H. 4. c. 4. and 11 H. 7. 17. and of this discharge also the assignee is not capable. The 3d is by union, as we see in *Trot and Greville's case*, 2 Rep. 48. and of this the assignee is not capable. The 4th is by prescription; and this goes to the assignee, according to the *bishop of Winchester's case*, 2 Rep. 44. and 42 E. 3. 3. The 5th is by composition real; and this discharge is transferable, according to the books of 8 E. 4. 13., 38 E. 3. 6. and the *Register* 38 & 39. The 6th is by council; and this is also transferable, according to 42 E. 3. 3. As to the first three discharges, they can never come in question in our law, because the suit was only between spiritual persons, and the ecclesiastical law had consue of them: and as to the other three discharges, they would never come in question in our law, but where the special matter of the discharge was contained in the prohibition, as we see by 2 Rep. 44. 8 E. 4. 13. and *Register* 38 & 39., and it being so, that a special matter of discharge was necessary at common law, the statute makes no alteration; for it does not alter the form of pleading for those discharges which were transferable; for as to those, it was merely delaratory *antiqui juris*: but, as to the other three discharges, which were not transferable at common law, it is introductive *novi juris*, for it makes them pleadable at the common law, whereas before the statute they were not so; and if the statute had not been made, those three discharges, being only personal discharges, would have been extinct; but the statute hath upheld them; but as to the other three discharges they would have remained well enough, though the statute had not been made. And the words "according to their estate and title," are words of great use; for otherwise a temporary discharge at the time of making the

statute would have been a perpetual discharge, which the statute now remedies. And as to the answer which has been endeavoured to be given to the book of 20 *E. 3. Avowry* 129. it will not suffice, for no such diversity is warranted by our books.

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2. The prohibition being in nature of a title, which a man makes to a thing against common right, (for he makes title to draw the conusance from the spiritual court to the temporal court), it ought to be special, according to the books of 30 *H. 6. 8.*, 32 *H. 6. 32.*, 7 *E. 6.*, *Dy. 85.*, and 2 *E. 3. p. 1.* 2. It is reasonable that there should be such certainty in the surmise, that the party may know to what he is to answer; and the jury may know what issue they are to try, according to *Comm. 84.* and 33 *H. 6. 32.* which cannot be unless the surmise be special. 3. The surmise being to oust a court of jurisdiction, ought to be special, according to 12 *H. 4. 13.* and 17 & 38 *E. 3. 6.*, where it appears, that the court shall not be ousted of jurisdiction without special cause shewn. And it appears by 22 *E. 4. 40.*, 18 *E. 3.*, *Barre 247.*, and 2 *Rep. 3.* that to allege a discharge generally, without shewing how, is not sufficient. And as to the impossibility which has been objected, there is not any such matter: for it is sufficient for the plaintiff to allege an immemorial unity of possession without more; and unless the defendant can shew the contrary, the issue will go in his favour: but, if the defendant can shew the foundation to be within time of memory, then the prohibition will not hold, according to the resolution in *Priddle and Napier's case*, which is direct in the very point in our case. And it has been the constant practice in prohibitions ever since the statute to make a special surmise, as we see by 2 *Rep. 47, 48.* 18 *Eliz. Dy. 349.*; and in the New Book of Entries, 450, 451. & 554.; and therefore there is no reason to make any alteration now, since such inconvenience will follow from it to the church.

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Supra 236.

Co. Entr.

Sir James Lea, Dodderidge, and Houghton J. seemed to incline, that the surmise in the case at bar was not good. *Sed adjournatur.*

[*Mr. Noy says in his argument in the case of Dickenson v. Greenhow, 2 Ro. Rep. 481. & infra, that the judgement in this case would have been affirmed, if the parties had not previously settled the matter.*]

P. 19 Ja. I. A.D. 1621.

Swadling v. Piers. [Cro. Jac. 613.]

EJECTMENT of a lease of tithes: and doth not shew that it was by deed. And because tithes cannot pass without deed after verdict for the plaintiff, exception being taken for this cause, it was ruled to be ill, and adjudget for the defendant.

Ejectment
for tithes
must shew
a demise
by deed.

1623.

Anon.

Trin. 21 Ja. A.D. 1623. B. R.

[2 Roll. Rep. 440.]

When
tithes are
set out, if
a stranger
take them
away, action
does not lie
in the spi-
ritual court
but in the
temporal.

CORN was cut down and the vicar took the corn, and said that the parson had no right, but that he had the right to the tithes. The parson sued the vicar for tithes of the corn, and also for the jactitation, and boasting, and defamation of the title of the parson to the tithes. *Ley C. J.* moved, whether by saying he had title to the tithes and not the parson, he could be sued. *Dodderidge J.* If one defames and scandals the title of the parson to tithes, although he is not punishable here, he is punishable in the spiritual court: and *Dodderidge J.* When tithes are set out, they are then lay chattels, and if a stranger carries them away, action does not lie in the spiritual court, but here; otherwise, if they are not severed from the nine parts. *Ley C. J.* agreed, and said, if a stranger take emblements before severance of tithes, the parson shall sue in the spiritual court for tithes against the trespasser, and not against the *terre tenant*, for he had them.

M. 22 Ja. A.D. 1624. B. R.

Dickenson v. Greenhill. [2 Ro. Rep. 479.]

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Whether
lands of the
abbey of
Cokersand
of the order
of Præ-
monstra-
tenses be
exempt
from tithes,
quoadmā,
&c.

GREENHILL is sued in the spiritual court for tithes; and in order to have a prohibition he suggests, that *Robert* the late abbot of *Cokersand*, was seised of the land in question in fee, as parcel of the monastery, and at the time of the dissolution; and that he and his predecessors from time whereof, &c. from their foundation to their dissolution, were of the order of the *Præmonstratenses*; and that all the abbots, and all the religious of that order from time whereof, &c. *immunes, liberi, privilegiati et exonerati fuerunt, et esse debuerunt a solutione omnium decimarum quarumcunque de et super* their lands, &c. *quandocunque manibus aut sumptibus propriis eas excolebant*: and that *Robert* and his predecessors from time whereof, &c. had enjoyed their lands, &c. free *de solutione decimarum quandocunque manibus et sumptibus propriis excolebant*: he then states the dissolution of the abbey, and the statute of 31 *H. 8.* and conveys title to himself, and that he was and still is seised in fee of the lands in question, *et habuit et habet in propria manu*, and therefore ought to be discharged of tithes; and sets forth the statute of 2 & 3 *E. 6.* that no one shall be compelled to pay tithes, who has a lawful discharge; and that nevertheless the defendant sues him in the spiritual court for tithes, &c.

Noy argued for the defendant.—Here are two discharges pleaded; the one by order; the other by prescription; the one is *manibus aut sumptibus*; the other is *sumptibus*; and here is a double application of these discharges. In the first place, as to the discharge

by order, it is to be considered, what discharge those of the order of Præmonstratenses had, and whether it be here well set forth. At first all monks paid tithes as well as other people, until pope *Paschal* in the council of *Mentz* ordained, that they should not pay tithes *de laboribus suis*. And this continued to be a general discharge until the time of *H. 2.* when *Adrian* restrained the exemption to three orders, the Cisterrians, Templars, and Hospitallers. The discharge of the Præmonstratensian order was made by a bull of *Innocent* the 3d. which is in the third Book of the Decretals; the words of which bull are larger and more ample than the discharge which the Templars, &c. had. But this bull never was allowed, nor is it mentioned in any of the expositions, neither is it in the *Gregorian* compilation. And when afterwards in the council of *Lateran* it was provided, *ne ecclesia nimium gravaretur*, that the privilege of the Templars, &c. should not extend to their farmers; most unquestionably, if the Præmonstratenses had had any such privilege, a provision would also have been made with respect to them, for the church would be equally aggrieved by them. In 34 *H. 3. 2. Membrana 1.* there is a clause, that there were several abbots of the Præmonstratensian order, who asked for the privilege of the Cisterrians; and this they would not have done if they had [403] had any privilege, especially a greater privilege (a): and there are several privileges in this bull which never have been allowed; as, that no one should take a palfrey from them; and yet when an abbot of this order did homage, the marshal would take his horse. So, that they *provocentur ad judic'*, and that they should not be cited before an ecclesiastical judge, but of their own order. And the parliament roll of the statute of 2 *H. 4. c. 4.* proves this (b): *Supra 11.*

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(a) *Calthorpe*, who has left us a part of Mr. *Noy's* argument, states him to have cited 54 *H. 3. Membrana 1.* by which it appears, that the abbot of *Cisteaux*, who was the head of the order of Cisterrians, certified, that the Præmonstratenses were not of the Cisterrian order.

(b) The following are the petition and answer, as they appear on the parliament roll: " A petition was delivered in parliament touching the order of *Cisteaux*, which, by the king's command, was sent to the commons to be advised thereof, and to declare their advice. The words of which petition are as follows: May it please our most excellent and most gracious lord the king to take into his consideration, that whereas from time whereof the memory runneth not, the religious men of the order of *Cisteaux* of your realm of *England* have paid all manner of tithes of their lands, tenements, and possessions let out to farm, or cultivated and occupied by any other persons than themselves, and also of all manner of tithable things being in and upon the same lands, tenements, and possessions, as fully and entirely, and in

" the same manner as your other liege subjects of your said realm: and that so it is, that of late the said Religious have purchased a bull of our most holy father the pope, by which our said most holy father has granted to the said Religious that they shall not pay tithes of their lands, meadows, tenements, possessions, woods, cattle, or any other thing whatsoever, though they be or should be let out to farm; any title of prescription, or right then acquired, or that might thereafter be acquired, to the contrary notwithstanding: which purchase and grant are in manifest opposition to the laws and customs of your realm; by reason that divers compositions real and indentures are made between many of the said Religious and others your lieges, for the taking of the said tithes: and also, by reason that in divers parishes the tithes demanded by the said Religious, by colour of the said bull, exceed the fourth part of the value of the benefices within the limits and bounds of which they arise; so that if the said bull should be executed, as well you, most dread Sire, as your lieges, patrons of the said

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passage.

the occasion of making that statute appears to have been, that the clergy exhibited a bull to the commons, which was a new bull of the pope for certain orders to be discharged of tithes of their lands though taken to farm, and this they said was against the law, and to the prejudice of the patron, and that the examination of the bull belonged to the king, and that therefore it might be avoided. And the clergy would not have done this, if the Præmonstratenses had had such a discharge. But it is objected, that though this bull hath not been allowed, yet it is good. I answer, *Negando quia non obierit quatenus habent vim legis, et quatenus habent vim rationis*; and there is a difference between a general law, and a common and particular sentence, as of a divorce, 11 H. 7. 12. And this is evident from M. 5 E. 1. or H. 1. Rot. 100. in B. R. where queen Eleanor brought a *quare impedit*, and had a writ to the bishop; and in a *quare incumbravit* against the bishop she stated, that she had recovered in a *quare impedit*, and had a writ to the bishop *ad admittendum clericum*; to which the bishop said, that it was ordained in the council of Lyons, that the six months should be computed according to weeks, and not according to the months of the year, and that according to weeks the six months were elapsed before the writ was delivered to him, and he collated: the queen replied, that the writ came to the bishop within the six months of the year, and that she was a lay person, and was not bound by the council: and recovered. And this is also proved by 10 H. 7. 18. and the statute of 21 H. 8. c. 21. It appears too by *Ordericus Vitalis*, fo. 111. that in the beginning of the Cisterians, their governor persuaded them to labour, and they cultivated their own lands, but that the white monks would not labour; and therefore

"benefices, will in a great measure lose the advantage of the same benefices: and the consequence, which in this respect belongs, and all the said time hath belonged, to your regale, will be discussed in court christian, against the said laws and customs: in order therefore to prevent the great trouble and disturbance which might arise among your people by the motion and execution of such novelties within your realm; may it please you, by the assent of your lords and commons assembled in this present parliament, to ordain, that if the said Religious, or any of them, put the said bull in execution in any manner, that then he or they who shall so put such bull in execution, be put out of your protection by process duly made in that behalf, and his or their goods be forfeited to you, for God and in works of charity.

"Which petition being read and understood, was answered in the words following: It is granted by the king and the lords in parliament, that the order of Cisterians shall remain in the same state in which it was before the

"time when the bulls comprized in the said petition were purchased; and that as well those of the said order, as all other Religious and Seculars, of what estate or condition soever they be, who put the said bulls in execution, or henceforth purchase any such bulls anew, or by colour of the same bulls purchased or to be purchased, take any advantage in any manner, shall have process made against them, and each of them, by garnishment of two months, by writ of *præmunire facias*: and if they make default, or be attainted, that they be put out of the king's protection, and incur the pains and forfeitures contained in the statute of provisors, made in the 13th year of king Richard. And further, in order to eschew many the like mischiefs in time to come, it is agreed, that our same lord the king shall send a letter to our most holy father the pope, to repeal and annul the said bulls so purchased, and of himself to abstain from making any such grant hereafter. To which answer the commons agreed, and that it should be made into a statute." Rot. Parl. 2 H. 6. No. 41.

there was greater reason, that the black monks who did labour should be discharged of tithes, than that the idle white monks should. And by their institution the black monks were not capable of appropriations, because they thought the tithes of right to belong to the vicars. In the *Chronicles of Normandy*, fo. 187. the number of black monks and of their abbies was certain; but there was no certain number of white monks; so that it was a greater grievance to the church that the white monks should be discharged, than that the black monks should be so.

But 2d, the plaintiff in this case does not shew how he is discharged, but only states generally that he is discharged. In 22 E. 4. 46. where one pleads there that he hath a sufficient discharge, and doth not shew how, it is not good: It is objected, that this is an ecclesiastical matter, as in a divorce. I answer, that such matters ought to be pleaded *concurrentibus iis, &c.* It was adjudged in *Slade and Drake's case*, in C. B. that it is not proper to say, that the abbey was discharged, without shewing how; which case was determined by the chief justice: and though a writ of error was brought upon that judgement, yet it would have been affirmed in this court if the parties had not previously come to a compromise.

3. The particular discharge is not well alleged: for it is, that the abbot, *ratione præmissorum*, shall be *exoneratus*; and here are two discharges shewn, and therefore it is uncertain. 30 H. 6. 2. 7. H. 7. And it is *quandocunque*, which is a condition, and the plaintiff does not shew, that he has performed it. 37 H. 6. 4. and 9 H. 6.

4. The particular discharge is not well applied: for the discharge is, when he cultivates with his own labour, and at his own expence; if then there be not both, namely, his labour, and his expence, there shall not be any discharge; as, if the lessee cultivates it, and the lessor afterwards enters for a forfeiture: so, where it is let out by halves, as, if it be *colamus partiemus*; there shall not be a discharge in that case. So, those who had their gardens discharged, were not discharged for *hortis conductis*. For privileges of this nature were *stricti juris*; and the plaintiff has not shewn here that he cultivated it with his own labour, and at his own expence.

[The case was argued again in H. 1 Car. by sir John Davis, the king's serjeant, for the defendant, and by Bankes of Gray's Inn for the plaintiff. This report is taken from Calthorpe's manuscripts.]

Davis. — I conceive in the first place that the privilege of being discharged from the payment of tithes in respect of the order of Præmonstratenses will not exempt the plaintiff in this case. For privileges of such a nature had their foundation and beginning, either in a general council, which is in nature of our act of parliament; or, in the pope's bull, which is in nature of our letters

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patents granted by the king; or in a canon or decree, which is in nature of our judgement at common law: and they are not founded upon any grant made by kings or queens of *England*. For it hath been resolved, where the king of *Hungary* granted to the hospital of St. *Stephen's*, that it should be discharged from the payment of tithes; that that grant, not being made by the pope, was not sufficient to exempt the hospital. Which being so, that such privilege must have its foundation either in a council, or in a bull, or in a canon or decree, we are to consider, whether any of these will serve in the case at bar. And I conceive, that they will not. For it is clear that in our law, neither council, nor bull, nor canon, nor decree, will bind here in *England*, unless they have been received and allowed here in *England*, and by such allowance and receipt have been made part of the law of *England*, as we may see by many authorities in the law upon the rule, which saith, *ubi non est condendi auctoritas, non est parendi necessitas*. And in 29 *H. 3. membrana 5. in dorso*, it appears, that the *English* bishops are not compellable against their will to go to a general council; and therefore they cannot be bound, unless they please voluntarily to submit to them, by any regulations that may be made at such council; whence it is, that notwithstanding the council of *Lyons* ordained, that the six months should be reckoned by 28 days in each month, and not according to the calendar; yet, that ordinance not being received in *England*, the common law adjudges, that the six months shall be taken according to the calendar; as we see by 5 *E. 3. Rot.* 100. which precedent is cited in *Catesby's* case, 6 *Rep.* 62. The ordinance of the council of *Lyons*, too, which excludes a *Bigamus* from clergy, was expounded by the statute *de bigamis*, and received according to the purport of that statute, and not according to the letter of the council. And as to the pope's bull, which are of four kinds, viz. 1. Excommunication, 2. Provision, 3. Citation, 4. Exemption, we find that our law does not allow any of them. For as to the bull of excommunication, 36 *Ass. pl.* 19. shews, that it was treason in any one who brought it in: and 2 *R. 3.* 3 & 4., 22 *H. 7.* 15., 8 *H. 6.* 3., 12 *E. 4.* 15. and 30 *E. 3. Excommengement* 6. agree, that a certificate of excommunication under the pope's bull will not work any disability. As to the bulls of provision, it appears by 19 *E. 3. Quare non admisit* 7. 12 *R. 2. Jurisdiction* 18. and the statute of *Carlisle*, 25 *E. 1.* that they had been received. As to bulls of citation, the statute of 38 *E. 3. c.* 1, 2, & 3. disallows them. And as to bulls of exemption, notwithstanding bulls of that nature have been allowed in some cases; yet, where they impugn the law of *England*, they are to be rejected, according to 11 *H. 4.* where it is said, that the pope cannot by his bull alter the law of *England*; and therefore that law

having settled, that tithes are payable of all lands, according to 22 *Ass.* it shall not lie in the pope's power to exempt any lands from such payment. And as to canons and decrees, it appears too that they had not any more favour than councils and bulls: and therefore, notwithstanding there was a canon made, that a bastard *eigne* should inherit, yet the statute of *Merton* proclaimed against it, *quod nolimus leges Angliæ mutari*: and in 10 *H.* 7. 18. notwithstanding there was a canon that clerks should not be empled before secular judges, yet the contrary was in use.

It being then apparent, that neither council, bull of the pope, nor canon, will bind here any farther than they have been received; we are now to examine at what time, and in what manner the privilege in question began. And as to that, the abbey of *Cokersand* was founded *A. D.* 1092, which was in the 5th year of *William Rufus*, and before time of memory: the foundation of the order of *Præmonstratenses* was *A. D.* 1120, which was in 20 *H.* 1. and the bull of pope *Innocent* 3d. by which the privilege of being discharged from the payment of tithes was granted to them, was *A. D.* 1188, which was in 34 *H.* 2. King *John*, on the 14th of *March*, in the second year of his reign, confirmed to the abbot of *Cokersand* all his rights and privileges; and there was a second confirmation made by *H.* 3. in the eleventh year of his reign. Now, though this abbey was so founded before time of memory, and there was a bull of the pope, and confirmation by the king; yet these facts are not stated in the count, and therefore no advantage can be taken of them; but the judgement of the court must be directed merely by the discharge which is there set forth, which is, in respect of order, or in respect of prescription. And the discharge in respect of order cannot be any direction to the court, inasmuch as it does not appear, whether such discharge were by council, bull, or cannon; and by any thing that appears, our law has not allowed it to this order, and therefore no advantage is to be taken in respect of the order. In 54 *H.* 3. *Rot. claus. in Turri*, 9. it appears, that there was a complaint made by the order of *Cisterians* against the order of *Præmonstratenses*: and in 2 *H.* 4. c. 4. and 7 *H.* 4. c. 6. where mention is made of the order of *Cisterians*, no mention is made of the order of *Præmonstratenses*. And notwithstanding that in the time of pope of *Paschal*, which was about the Conquest, it was ordained by the council of *Mentz*, that all religious persons should be discharged of the payment of tithes of their lands, *quamdiu propriis manibus excolebantur*; yet, that ordinance was afterwards varied by pope *Adrian*, and a decree made in 19 *H.* 2. that all religious persons, except three orders, *viz.* the *Templars*, *Hospitallers*, and *Cisterians*, should pay tithes of their lands; and in this decree there is no mention of the order of *Præ-*

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monstratenses : neither is the order of Præmonstratenses mentioned in the council of *Lateran*, which was *A. D.* 1215, and which excepts the other three orders. All which shews that it was not generally received beyond sea, that the Præmonstratenses were discharged of the payment of tithes in respect of their order ; and if not beyond sea, still less here in *England*. And as to the prescription, monks being lay persons, *qui vivebant in solitudine ex sudore vultûs, et ecclesiasticis negotiis miscere non debebant*, according to the council of *Chalcedon* ; they were not accounted part of the clergy, nor could they prescribe *in non decimando*, according to the rule, *quod monachi decimis præscribere non possunt, quia habere non possunt*. And it appears too by *Adrian's* decree, and the council of *Lateran*, that hospitals were not capable of tithes. If then the order could not prescribe *in non decimando* before their dissolution, the patentee shall not be discharged of the payments of tithes after their dissolution ; and so, consequently, the prescription will not serve their turn without shewing some particular discharge.

2dly. I conceive, that the plaintiff has not applied his case either to a discharge in respect of order, or to a discharge in respect of prescription : for he only shews, *quod gavisus fuit in propriâ manurantiâ*, without shewing that the lands were *in propriâ manurantiâ* at the time when the tithes were demanded. They might too be in his own manurance, and yet not *excoli propriis manibus et sumptibus* ; for some one might till them for him, and take a moiety of the profits ; and where any one makes title by grant or prescription, he ought to apply it directly, else he shall not take advantage of it, according to the cases of 11 *Ass. pl.* 37. 17 *Ass. pl.* 7. 34 *H. 6.* 24. and 9 *H. 6.* where one justifies for common *quando-cunque averia sua venerint*, he ought to shew that his cattle then went in the place, where, &c. And in the *New Book of Entries*, 450, 451, 452. you will see a special application of the prescription ; for there it is expressly alleged, in a case where the like privilege was claimed under the Cisterians, *quod manibus suis propriis et sumptibus excoluit*.

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3dly. I conceive, that the discharge in respect of order and in respect of prescription, makes the plea double, according to the books of 44 *E. 3.* 3., 10 *H. 7.*, and 22 *H. 6.* 10.

Bankes contra. — It is evident by the books of 11 *H. 4.* 37. 69. & 76., 19 *E. 3.* *Quare non admisit* 7., 24 *E. 3.* 30., 2 *Rep.* 47. and 5 *Rep.* 2. *Quare impedit* 54., that the law of the church received here in *England* is part of the law of *England* ; and the order of the Præmonstratenses being received here, as appears by 22 *E. 1. memb.* 8. *Rot. patentum*, where it is stated, that there were twenty-six abbies of this order, and by the statute of *Carlise*, 35 *E. 1. c.* 1 & 4.

which makes mention of this order; it must necessarily follow, that the privilege which was incident to the order should be also received and allowed. It appears too in the ledger-book of the abbey of *Cokersand*, that in 12 *E.* 3. there was a definitive sentence given, that the abbot of *Cokersand* should hold his lands discharged from the payment of tithes. And notwithstanding the order of Præmonstratenses be omitted in the statute of 2 *H.* 4. yet that is not any argument at all: for it might be, that that order was omitted, because there was no cause of complaint against it; and the privilege being a privilege *in esse* before the time of *R.* 2. the statute of 2 *H.* 4. does not extend to it.

2dly. I conceive, that the abbot and convent are such a spiritual corporation as is capable of tithes in pernaney; and is also capable of prescribing *in non decimando*, as a bishop is, according to 2 *Rep.* 44. (a)

3dly. There being a demurrer to the count in prohibition, it is confessed, that there is such a privilege belonging to the order of Præmonstratenses, and also that the abbot and his predecessors were discharged of the payment of tithes; for these are matters in fact, of which the demurrer is a confession in fact, according to 34 *H.* 6. 8. and 10 *E.* 4. 5.; and then the privilege and prescription incident to the order being true, the statute of 31 *H.* 8. c. 13. will make it a good discharge, according to *Priddle and Napier's case*, 11 *Rep.* 14. Supra 236.

As to the objection which has been made, concerning the doubleness of the plea, it is out of the case; for the demurrer is a general one; and the doubleness of a plea, does not make the plea bad in substance, though it be bad in form, according to 37 *H.* 6. 6. *Dy.* 170, 171. and 11 *Rep.* 10. And as to the objection, that the prescription and privilege are not well applied, because a continuance of seisin is not averred, I answer, that it is implied in the count; and farther, that it is not necessary to aver it, where it is shewn in the count that the plaintiff has an estate in fee-simple in him, according to *Comm.* 190. 431., 31 *H.* 6. 10., and 7 *H.* 7. 3. And as to the objection, that the count is bad, because the manner of the discharge is not set forth, whether it was by council, canon, or bull of the pope, I answer, that the manner of the discharge need not be set forth, because the search for it might be infinite: and notwithstanding the law obliges a man to shew the discharge particularly, where it may be shewn without inconvenience, according to 5 *E.* 4. 8., 22 *E.* 4. 4. and 2 *Rep.* 4. yet, where infinite search, or other inconvenience would follow, it does not require it, according to 17 *E.* 3. 11. 26 *H.* 8. 8., 20 *E.* 4. 15., 12 *H.* 4. 23., 19 *H.* 6. 75., *F. N. B.* 41.

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(a) *Archbishop of Canterbury's Case.*

1624. and 11 Rep. 10. and therefore I pray judgement for the plaintiff.
 —*Sed curia advisatur.* (a)

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[*What the determination of the court in this case was, I have not been able distinctly to discover. It should seem, however, that they gave judgement against the plaintiff, upon the informality of the suggestion. For Serjeant Turnor, in a rather imperfect report of this case in manuscript, tells us, "it was said by the court, that the prescription "laid in the abbot and his predecessors for the discharge quando- "cunque propriis manibus, &c. is the material thing, and that on "which the plaintiff might have relied; and that the order and "privilege appertaining to it are not very material: but that there "was a fault in the suggestion; for that the prescription does "not apply, the plaintiff not averring that at the time, for which "the tithes were demanded, the land propriis manibus et sumptibus "excolebat."*]

Tr. 1 Car. A. D. 1627. B. R.

Whitton v. Weston.

The lands belonging to the order of St. John of Jerusalem, which was dissolved by 32 H. 8. are discharged of the payment of tithes by 31 H. 8. This state of the pleadings is taken from Winch's Entr. 342.

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WILLIAM Whitton brought an action of debt upon the statute of 2 & 3 E. 6. against Sir *Richard Weston*, knight, for not setting out tithes; and declared that he was parson of *Merrowe* in the county of *Surry*, within which parish the defendant occupied certain lands, which he sowed with corn in 21 and 22 Ja. and severed and carried away the corn, which he there raised, without setting out the tithes.

* The defendant as to part, pleaded, *nil debet*; and as to the residue, he pleaded specially, that *Wm. Weston*, late prior of *St. John's of Jerusalem in England*, was seised in fee, in right of his hospital, of parcel of the lands in question, and that he and his predecessors by reason of their order, time out of memory, held the said lands discharged of the payment of tithes, *quamdiu propriis manibus suis excolebant*: that by a clause in the statute of 31 H. 8. c. 13. the king and his assigns shall hold the lands of monasteries, as freely as the abbots themselves held them: that by a clause in the statute of 32 H. 8. c. 7. none shall pay tithes, who by law, statute, or privilege ought to be discharged: that by the statute of 32 H. 8. c. 24. the Hospitallers were dissolved, and all their possessions vested in the king: that by virtue of that statute, the king was seised thereof, and held the same discharged from the payment of tithes, and that they descended to queen *Elizabeth*, who granted the lands in ques-

(a) As to the exemption of the Præmonstratenses, see *Townley v. Tomlinson*, post. 1004. Selden on Tithes, c. 13. p. 406.

(b) Hargr. Bibl. No. 30. Reports, C. K.B. and *Escheq.* by *Arthur Turner*, Temp. Jac. et Car. 1.

tion to the defendant's grandfather, to hold as amply as the late prior held them; that the defendant is now seised thereof by virtue of the said grant, and at the time for which the tithes are demanded, and continually from thence until the commencement of the suit *propriis manibus et sumptibus excolebat*: that by the statute of 2 & 3 E. 6. no man shall be compelled to pay tithes for any manors, lands, &c. discharged thereof by any law, prescription, or composition real: and that therefore he sowed the land, and carried away the corn, without setting forth the tithes, as it was lawful for him to do.

To this plea the plaintiff demurred generally.

Noy argued for the plaintiff. He contended, 1st. that the prior of St. John's of Jerusalem in England and his brethren were not ecclesiastical persons, and therefore their possessions were not discharged from the payment of tithes, either by the statute of 31 H. 8. or the statute of 32 H. 8. 2. That the possessions of the prior of St. John's of Jerusalem are not discharged of the payment of tithes in the hands of a purchaser. 3. That the discharge being only special, *viz. quamdiu propriis manibus excoluntur*, such special manner of discharge is not properly applied to the defendant, so that he can be capable of the discharge. As to the first point he said, that although the prior of St. John's of Jerusalem and his brethren were religious persons, for that they took the *tria vota substantialia* of poverty, chastity, and obedience, and were dead persons in law, as it appears by 31 E. 1. *Triall* 99., 1 E. 3. 7., 19 E. 3. *Feoffment* 68. 12 R. 2. *Nonhabilitate* 4. the Statute of Templars, 17 E. 2. 2 Rep. 3. 4. and 21 H. 7. 7. yet they are not ecclesiastical persons, nor accounted in the number of such; though they had the liberties of ecclesiastical persons granted to them by special privilege. For, 1. upon the taxation in 20 E. 1 (a). when all ecclesiastical persons were taxed to the payment of tenths, they did not pay the tenths, as other ecclesiasticks did. 2. In their summons to parliament, they were summoned by a *vobis mandamus in fide et ligeantia*, or *homagio* (b), as in the summons to temporal persons; whereas ecclesiastical persons were summoned by a *vobis mandamus in fide et dilectione*. 3. It was the rule of the prior and brethren of this order *armis se exercere*; which was contrary to the canon and rule of ecclesiastical persons; for they could not meddle with arms. 4. Upon admission into this order, there was no imposition of hands, which was requisite to all ecclesiastical persons. 5. The statutes

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MSS. Calthorpe.
There is a more diffuse report of this argument in Godbolt, 392., but, as it is in many passages confused and incorrect, I have given the preference to this sketch of it by Calthorpe. There is another account of this argument in Latch, 89. [412]

(a) Qu. Whether this ought not to be the 25th of E. 1. as there was no taxation in the 21st of that king.

(b) I meet with but one instance in Dugdale's Summons, where the prior of this hospital was summoned among the temporal lords, and that is in 14 H. 8. fo. 493. But several instances oc-

cur, where he is expressly named as being summoned by the very same form of summons as was written to the Archbishop of Canterbury, and the other spiritual lords; as in 49 E. 3. fo. 2. 23 E. 1. fo. 8. 21 E. 3. fo. 229. 1 R. 2. fo. 294. 31 H. 6. fo. 447. 38 H. 6. fo. 455. 9 & 10 E. 4. fo. 469.

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of 27 *H. 8.* and 31 *H. 8.* do not extend to them, and yet they extend to the possessions of ecclesiastical persons; and the commissions which issued between the 27 *H. 8.* and 31 *H. 8.* were not to inquire of them. 6. The statute of 26 *H. 8.* for the payment of first fruits does not extend to them; and yet all ecclesiastical persons are within that statute. 7. The special act of parliament made in 32 *H. 8.* concerning them, shews that they were of a different kind from other ecclesiastical persons. Not being then ecclesiastical persons, the statute of 31 *H. 8.* which extends only to ecclesiastical persons, will not extend to them. Besides, the prior of *St. John of Jerusalem* and his brethren not being dissolved before the 32 *H. 8.* and being a body of more

Supra 189.

nature than other ecclesiastical persons are, the statute of 31 *H. 8.* will not extend to them; for that statute will not extend to those, who are dissolved by a subsequent act of parliament, as appears by 2 *Rep. in the Archbishop of Canterbury's case.*

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As to the 2d point, he contended, that the privilege would not discharge the possessions from the payment of tithes in the hands of a purchaser; because the discharge was a discharge *ratione ordinis*, which was personal, and would not extend to any other persons than those of the order.

As to the 3d point, he contended that the discharge was not properly applied to the defendant; because, though it appeared that the lands were in his manurance when they were sown; yet, it did not appear that they were so when the tithes were taken away, nor when they were due. And farther, it did not appear that the grain with which the land was sown, was the proper grain of the purchaser.

Crawley serjeant, for the defendant, contended, as to the first point, that the prior of *St. John of Jerusalem* and his brethren were both religious and ecclesiastical persons: for they had appropriations, tithes, and other ecclesiastical privileges, of which none but ecclesiastical persons were capable: and they always set forth in pleading, that they were seised *in jure ecclesiæ*, which could not be of any other than ecclesiastical persons. And in proof of this he cited 3 *E. 3.* 11., 42 *E. 3.* 22., 35 *H. 6.* 56., 22 *E. 4.* 42., 26 *H. 8. c. 3.*, 27 *H. 8. c. 10.*, 44 *Ass. pl. 9.* and 31 *E. 1. Triall* 89.

As to the 2d point, he insisted, that the possessions of the prior of *St. John of Jerusalem* and his brethren were discharged of the payment of tithes in the hands of a purchaser; for that this privilege is a real discharge, and is a discharge by way of prescription time whereof, &c. of which a purchaser shall be as well capable by the statutes of 31 *H. 8.* and 32 *H. 8.* as the prior and his brethren themselves. And although it was only a personal privilege, yet it might well enough be transferred by act of parliament, according

to 3 E. 3. 11. and 35 H. 6. 56. And the cases of † *Quarles and Spurling*, P. 44 *Eliz. Rot.* 944. in *B. R. of Urry and Boyer*, Tr. 8. *Ja. Rot.* 1941. or 2491. in *C. B. and the lord Darby's case*, Tr. 38 *Eliz. Rot.* 4. and 10 *Eliz. Dy.* 277. were vouched. And he said, however the case of *Quarles and Spurling* was adjudged, yet the lands at this day are discharged of the payment of tithes, and no tithes are in fact paid. And in the *New Book of Entries*, 450, in the *Abbot of Fountain's case*, a prohibition was granted, and the possessions were holden discharged of the payment of tithes.

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† *Supra*
224.
Supra 250.
Supra 132.
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As to the 3d point, the pleading was ruled to be good the last time the case was argued. The defendant hath well entitled himself to the discharge: for he hath pleaded, that he had the occupation of the lands for one whole year, and that he ploughed, and sowed, and reaped the corn upon the lands at his own costs and charges; and the plaintiff hath admitted all this.

Sir W. Jones mentions that the case was argued at the bar several times.

Dodderidge J. said, that the prior of *St. John's* and his brethren were ecclesiastical persons, and in reputation taken as part of the church, notwithstanding that *Selden* in his *History of Tithes*, fo. 121, 122. says, that it was adjudged in the court of *Aides* in *Paris*, that they were not any part of the clergy. It appears, too, from the statute of 2 & 3 *Mar. c.* 8. and *Dy.* 255. that colleges are a lay corporation, and not part of the clergy.

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The case was argued in *Tr. 4 Car.* by the four judges. The main question upon the matter in law was, whether these lands were discharged from the payment of tithes or not, either by the statute of 31 *H. 8.* or by the statute of 32 *H. 8.* or by both together?

This report of the argument is taken from *Sir Wm. Jones's Reports*, 182.

Whitlock held, that the lands were not discharged, neither the one way, nor the other. *Hyde C. J.* held, that they were discharged by 32 *H. 8.* and not by 31 *H. 8.* *Dodderidge* and *Jones* held, that they were discharged by the statute of 31 *H. 8.* and admitting that the statute of 31 *H. 8.* does not discharge them, yet the statute of 32 *H. 8.* did. So that upon the matter, three judges were of opinion for the defendant, and *Whitlock* only for the plaintiff.

They all agreed, that the case, though it was not great in the particular in question, yet, in the general, it was a question of great consequence, and concerned all the possessions of the Hospitallers, which were very large. Therefore it was requisite that it should be discussed with great deliberation, which they had done.

The questions were four, 1. Upon the statute of 31 *H. 8.* 2. Upon the statute of 32 *H. 8.* The two questions on the statute of 31 *H. 8.* were, 1. whether this corporation was a religious and ecclesiastical corporation, and so in regard of its nature within the statute of 31 *H. 8.*? and, 2d. (which was the greatest question) whether the

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clause of exoneration from tithes, which was given by the statute fo 31 H. 8. should be extended to these lands, which were given to the king by the statute of 32 H. 8. and not by 31 H. 8.?

The two questions upon the statute of 32 H. 8. were, 1. as the Hospitallers were dissolved by 32 H. 8. and all their possessions, hereditaments, and privileges given to the king, whether this privilege, which the corporation had, of being discharged from tithes, was given to the king or not?

2d. Admitting that it was given to the king, whether it extends to the king's patentees and assigns, or not? the words of the statute being, that the possessions and privileges were given to the king, his *heirs and successors*, and not to his *assigns* by special name.

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Dodderidge, Jones, and Whitlock, argued that this corporation was a religious and ecclesiastical corporation within the words of the 31 H. 8. *Dodderidge and Whitlock* spoke at large and very well, from history, the canon law, and the constitution of the church, of the origin, nature, and condition of this corporation, and shewed that it was first introduced into this kingdom about 1140. See the case of *Sutton's Hospital*, (a) *Matthew Paris*, and *Camden's Britannia*, in the description of *Middlesex* (b). The three judges agreed, that it was at first a religious order; that they were professed; bound to obedience, chastity, and poverty; assumed a religious habit; and were disabled from purchasing lands, 1 E. 3. 9. unless in their politick capacity. To plead that the party was professed, and of the order of Templars, was a good plea. In 31 E. 1. *Fitzh. Triall* 98. 99. it was pleaded that the party was professed in the order of St. John's of Jerusalem, and a good plea: and 12 R. 2. *Fitzh. Nonhabilitate* 4. the like plea holden good; and there it appears, that there was a woman of this order. In 19 E. 3. *Fitzh. Feoffments, &c.* 68. and 19 Ass. pl. 9. a commander (who was under the obedience of the prior) could not make a feoffment, because a dead person in law. And 22 R. 2. *Fitzh. Trespas* 33. (c) it appears, that there was an abbot of this order, who was a person dead in law, and religious. And the profession shall be tried by the country; for they were exempted by the pope from the visitation of the ordinary; and the court cannot write to the pope; so that it must be tried by the country. 2 R. 3. 4., 22 H. 7. 7., 31 E. 1. *Fitzh. Triall* 99. See the case of *Martin Docwra*, (d) 27 H. 8. 14 b. which proves

(a) 10 Co. 1.

(b) It appears from *Calthorpe's* report of this argument, that *Favinc's* "Theatre of Knighthood" and *Honour*," and the "Catalogus glorie mundi," were also referred to. — There is an enumeration of the writers, who have given the history of this order, in *Fabricius, Bibliograph. Antiquar.* p. 465. but it is said not to be complete. The best and most recent history is that

of the *Abbé Vertot*. See also *Helgot's Hist. des Ordres*, tom. iii. p. 72.

(c) Qu. For there is no such case under this placitum, nor is the 22 R. 2. once referred to in this title.

(d) The name of the prior, who was summoned to parliament in 14 H. 8. was *Thomas Docwra*.

that they are dead persons in law. The statute of their dissolution makes this clear also; for there they are several times called *religious*, and are discharged of their order, and made capable of suing at common law, and of purchasing. But, though the brothers could not sue at common law, because they were persons dead in law; yet the prior could sue, which see in 32 *H. 8.* 5. and *F. N. B. tit. Sine assensu capituli.* 42 *E. 3.* 22. and 44 *E. 3.* 16. and in many [416] other books.

It is also ecclesiastical, for that is the genus; and the species are either religious or secular, and though they were not in orders, and clerks, yet they were ecclesiastical; for they were under the visitation of the pope, and derived their original foundation from him, as it appears in the statute of 32 *H. 8.* They are therefore ecclesiastical, for he never claimed any power but over ecclesiasticks. In *F. N. B.* 194 *K.* there is a writ *De sine assensu capituli* given to the prior for lands which he claims to be the right of his church: this therefore is a further proof that they were ecclesiastical. And by *Jones*, no one can claim a discharge of tithes, but an ecclesiastical person, 2 *Co. (a) Wright's case*; and no one is capable of an appropriation, but an ecclesiastical person, *Grendon's case in Comm*: and this corporation was capable of both, and therefore must have been an ecclesiastical corporation: and by 26 *H. 8.* it shall pay first fruits, and tenths, as an ecclesiastical person. And by *Jones*, though the order were founded by the pope, and had their rules and habits from him; yet they were not capable of taking land, or of suing, or being sued, but by prescription, the king's patent, or by act of parliament; for that was a temporal power, which could not be derived from the pope, nor could he (even when he usurped power here) enable any corporation to sue or be sued. This is evident from 9 *H. 6.* 16. where the king licensed one to found a chantry, and exception was taken, because there was no licence from the ordinary; & *non allocatur*. And these three judges concluded, that it was a religious and ecclesiastical corporation within the statute of 31 *H. 8.* and that it must be both; for if it was ecclesiastical only, and not religious, it was out of the statute, as it appears from the *Archbishop of Canterbury's case*, in 2 *Rep.* But *Hyde* said nothing, nor did he deliver any opinion upon this point, because he held upon the second point, that the statute of 31 *H. 8.* did not give any discharge.

As to the 2d point upon the statute of 31 *H. 8.* *Whitlock and the Chief Justice* argued, that the lands were not discharged by the 31 *H. 8.* They said, that that statute did not give any lands or

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Supra 136.]

Supra 189.

1627. monasteries, but settled in the king the lands of monasteries dissolved or to be dissolved, as is holden in 1 *Mar.* 111. and in the *Archbishop of Canterbury's case*, 2 *Rep.* And as *Whitlock* said, the statute was *bifrons*, it had relation to monasteries dissolved before the act, and to those to be dissolved afterwards, and their possessions:
- [417] *quod fuit concessum* by all. But they said further, that the intent and words of the statute were merely to give a discharge to those lands only that came to the king by virtue of that act, and not by virtue of any other act: that it does not therefore extend to lands which came to the king by the statute of 27 *H.* 8. for the dissolution of the lesser monasteries, as was resolved in *Wright and Gerard's case*, in *C. B.* 18 *Ja.*; nor to lands which came to the king by the statute of 1 *E.* 6. of *Chantries*, as was resolved in the *Archbishop of Canterbury's case*; nor to lands which came to the king by the statute of 32 *H.* 8. as was adjudged, (as *Whitlock* said,) *Hil.* 44 *Eliz.* in the case of *Quarles and Spurling*, *Rot.* 994. which commenced in that term, and was so adjudged in 2 *Ja.* And the words in the clause of discharge in the preamble, and also in the conclusion are "late monasteries," and not generally. And though the purview be general, yet it is qualified by the preamble, and shall have relation to the preamble. It is clear, as they said, that these lands did not come to the king by force of the statute of 31 *H.* 8. but by the statute of 32 *H.* 8. solely, and that for two reasons. The first reason was, that they must be lands which came to the king by dissolution, surrender, renouncing, or by any other means: but these lands did not come by relinquishment, by renouncing, or surrender, but by act of parliament; and other means do not include an act of parliament, but must be lower means than an act of parliament. And upon this they cited the statute of *Marlbridge*, which gives remedy to the successors of abbots, or other prelates for the goods of the church taken in time of lapse or vacation, that this does not extend to a bishop. [But note, the successor of a bishop hath nothing to do with the goods of the bishop, for they belong to the bishop's executors.] They also cited a case of 2 *Mar.* in *Lord Dyer* 109. upon the statute of *West.* 2. which gives the *contra formam donationis* against abbots and other religious men, that that does not extend to a bishop, because he is superior to them. So the statute of 13 *Eliz.* of *leases made by dean and chapter and other ecclesiastical persons*, does not extend to bishops: which cases are put in the *Archbishop of Canterbury's case*. 2. They said, that supposing that *other means* do include an act of parliament; yet, when the succeeding statute of 32 *H.* 8. says, that the lands shall be vested in the king by that statute, that controls the preceding statute of 31 *H.* 8. for *leges pos-*

teriores abrogant priores, where they are the direct contrary; wherefore they concluded, that the statute of 31 *H. 8.* does not give this discharge.

Dodderidge and Jones e contra. — They said, in the first place, that this point never was adjudged, as they found by inquiry. It was in question in *C. B.* between *Urry and Boyer*, but the court was divided, that is, *Coke and Nicholls* were of opinion, that the lands were subject to the payment of tithes; and *Winch and Warburton*, that they were not. As to the case of *Quarles and Spurling*, though it was adjudged, yet the judgement went upon another reason; for it was not found there by the verdict, (which was special) that the lands came by dissolution to the king, nor was there any mention made of the statute of 32 *H. 8.* and then, if there was not a dissolution, (as happened in that case), the farmer must pay tithes. And after that judgement in *Spurling's case*, and after the division in the case of *Urry and Boyer*, it was made a point in the *Serjeant's case (a)*. This therefore proves, that the case was never adjudged: for no adjudged case was used to be put in the *Serjeant's case*, but a point of doubt, which was in controversy. *Dodderidge* said, that the 32 *H. 8.* was made from necessity, for that this corporation had power to purchase, but not to alienate lands, and that therefore without an act of parliament they could not surrender them. But it seemed to *Jones*, that they were capable of surrendering them; for though it was a great order, yet it was a particular corporation in this country, which had power to sue and be sued, to purchase and to alien; 32 *H. 6. 5.* And the statute of 33 *H. 8. c. 5.* in *Ireland* proves this: for there it appears, that, before the making of that statute, the prior of *St. John's of Kilmainham* had made a surrender to the king. But the true reason, as *Jones* thought, was, that they were beyond the sea, and would not surrender; and being abroad they could not be compelled to surrender, as appears by the preamble of 32 *H. 8.* *Dodderidge* said too, that these words "other means whatsoever," include an act of parliament; for there were no other means to convey the land to the king but by act of parliament, and such means as are particularly mentioned in the statute of 31 *H. 8.*: therefore, as he thought, this dissolution by 32 *H. 8.* is within the words "other means," and so within the words of 31 *H. 8.* *Jones* said, that be-

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Supra 250.

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(a) I presume, that the *Serjeant's case* here alluded to is the case, *supra* 281. Since that part of the work was printed off, I have discovered the pleadings in that case in *Winch's Entries*, 197. This shews that there really was such a case as that which is there called the *Serjeant's case*; though it should seem from what *Mr. Justice Jones* here says, and from what is said by

my *Lord Nottingham* in the *Duke of Norfolk's case*, p. 31, 32. that the cases which, in general, went under that name, were rather points of doubt and difficulty, proposed to the serjeants as subjects of discussion and amicable contention, and for the exercise of their wits, than any cause then actually depending for the judgement of the court.

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pl. 72.

Supra 375.

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cause this point was otherwise determined in the *Maidstone case*, he had submitted to it; but, he said, that if the statute of 31 H. 8. had dissolved the corporation, and had said nothing further, in that case, this dissolution had been within the express words of 31 H. 8. not indeed within the words "any other means," but within the word "dissolution;" for the word "dissolution" includes dissolution by act of parliament, as well as by surrender or other means; and therefore, if the statute of 32 H. 8. had only made a dissolution of the corporation, and not enacted that the lands should be vested in the king by that act, they would have been in the king by the statute of 31 H. 8. but, because the statute of 32 H. 8. says precisely, and enacts, that the lands shall be vested in the king, it controls in express terms the vesting by 31 H. 8. and in that point they agreed with *Whitlock*. In 1 *Mar. Bush and Culpepper's case*, the statute of 33 H. 8. c. 2. vests in the king the actual possession of the lands of one attainted. *Culpepper* was attainted by a special act; and the possession was vested in the king by that statute, and not by the 33 H. 8. But they said farther, that though they are not vested by 31 H. 8. but by 32 H. 8. yet the clause of discharge of 31 H. 8. extends to them: and so said *Dodderidge* also. And first they answered the authorities to the contrary, and next the reason; and then they confirmed their opinion with reason and authority. The cases were two, namely, the *Maidstone case*, and *Wright's case* (*Spirling's case* being already answered). As to the *Maidstone case*, the main point upon which the resolution was grounded was, that because the unity of possession was not personal, it was a good discharge within the 31 H. 8. But, as to the point now in question, they came to no resolution upon it (though it be otherwise reported in the case in print.) *Fenner and Popham* were of opinion, that the statute of 31 H. 8. did not give any discharge to those lands which came to the king by 1 E. 6. but *Gawdy* (*absente Winch*) *e contra*. *Wright's case* was this: the prior of *Hatfield Bradock*, in the county of *Hertford*, was seised in fee of the impropriate rectory of *Hatfield Bradock* in that county, and also of a farm called *Downhall* in the same county, the priory being under 200*l. per ann.* was dissolved by 27 H. 8. Afterwards king H. 8. granted the farm to the nuns of *Barking*, and upon their dissolution it came back to the king by 31 H. 8. The king granted the rectory to *Trinity College in Cambridge*, and the farm to another person: the farmer of the rectory sued the tenant of the farm in the ecclesiastical court for tithes, and he brought a prohibition. It was adjudged by *Hobert, Winch, and Hutton*, against *Warburton*, that a consultation should be awarded. In this case these points were resolved by the three judges: 1. That the impropriation was given to the king by the statute of 27 H. 8.

though impropriations be not mentioned in it, but all *tenements, churches, tithes, and hereditaments*. 2. If it was not granted and given to the king by the statute of 27 H. 8. then it was not given by the statute of 31 H. 8. for by the dissolution in the 27 H. 8. the body, to which the appropriation was made, was dissolved, and, consequently, the appropriation was gone, as in 2 E. 3. in the case of the Templars; and the statute of 31 H. 8. does not extend but to those appropriations which were not dissolved until after 4 Feb. 27 H. 8. 3. It was agreed that the statute of 27 H. 8. does not *per se* give any discharge from tithes. And, 4. That unity of possession perpetual, and beyond time of memory of the lands and rectory, does not *per se* make a good discharge of tithes, without the benefit of the said clause. 5. They resolved, that the clause of discharge in 31 H. 8. extends to those monasteries which were dissolved, but it extends only by way of exclusion to those monasteries which were dissolved after the 4th day of Feb. 27 H. 8. and the resolution as to the last point differs from the case in question; for there it was an absolute exclusion of all abbies, but here there is no such exclusion.

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The authorities being answered, it remains to answer the reason, which is no other, than that the equity and intent of a former statute do not extend to a subsequent statute, which is an argument urged in the *Maidstone case*, with a *teste meipso*, without any authority in law precedent to it, to warrant the opinion. And Jones said, that this reason is neither good, nor strong; for that in many cases, by the equity and intent of precedent statutes, things ordained by subsequent statutes were aided. *Littleton, tit. Warrantie*, and 38 E. 3. 23. By the equity of the statute of Gloucester made in 6 E. 1. a person shall not be barred by a lineal warranty to make title by the statute of 13 E. 1. without assets. 27 H. 8. 29. the statute of Marlbridge helps a feoffment by collusion made by the tenant in demesne. 4. H. 7. gives the wardship of *cestuy que use*, if he made a feoffment; this is within the equity of the statute of Marlbridge. *Buckley's case in the Comm.* (a) the statute of 27 H. 6. extends to Wales, which was united to England afterwards by 27 H. 8. and the 21 E. 3. c. 11. the statute of Acton Burnell, provides, that if goods be over-valued, the extenders shall answer for it: by 13 E. 1. [421] *de Mercatoribus*, execution is given of land upon a statute-merchant: if the extendors extend the land too high, they shall answer by the equity of the statute 11 E. 1. which was made before it. And 12 Eliz. Dy. 288. 289. a grant of the forfeiture of treason; if another treason be made afterwards, the grantee shall have the forfeiture of that also. The authorities and reason then are answered. And

Qu.

(a) Flowd. 118.

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to confirm their opinion, *Jones* said, that the words and intent of the statute do that: the words in the purview are general, namely, "lands of all monasteries and ecclesiastical houses." And though in the preamble and conclusion of the clause, the words are "late monasteries," yet those words shall not be construed literally, but generally, according to the purview, otherwise monasteries afterwards dissolved were out of the statute (for those were not "late"); but it was agreed in the *Maidstone* case, and it is clear, that monasteries dissolved after the statute are within this clause. And for the intent it appears plainly: for if the hospital had been dissolved without a subsequent act of parliament, it had been within the purview of this clause; and when this was done afterwards by an act of parliament, because the brethren were not present to make a surrender, this shall not take it out of the intent (a); for the intent was to extend the clause to all monasteries, &c. dissolved according to the said statute; and those which were in possibility of being dissolved according to it are within the intention of the law. And

Supra 236.

to prove this, he cited *Priddle and Napier's case*, 11 *Rep.* an insufficient surrender of a monastery was made, and afterwards the statute of 35 *Eliz.* aided it: now the lands came to the king by the statute of 35 *Eliz.* and yet the clause of exoneration from tithes extends to the monastery. A statute was made in *Ireland* by 33 *H. 8. c. 5.* and by that statute the priory of *Kilmainham* and all monasteries there were dissolved, and their possessions given to the king; and this clause applies to both, that is, to the priory and monastery equally; and there was a statute made in *Ireland* 4 *H. 7.* that all [422] acts to be passed there must be allowed here in *England*. Now it is not probable they would agree, that in *Ireland* these lands should be discharged, and the lands in *England* should not. And they concluded with the 10th of *Elizabeth, Dy.* where the opinion of the chancellor, the two chief justices, and the chief baron and justice *Southcott*, was, that the lands of the hospital of *St. John of Jerusalem* were exonerated from the payment of tithes by 31 *H. 8.*

Stathome's
case.
Supra 132.

And as to the statute of 32 *H. 8.* *Whitlocke* held, that that does not give the king any discharge from tithes; and if it did, yet it does not extend to the king's patentees. The three other judges *e contra*. They all agreed, that this privilege *non solvendi decimas* was given by an ancient council; and by the council of *Lateran* the privilege was explained, that it extended only to those lands which

(a) This and other parts of the sentence are quite unintelligible in the original; whether I have succeeded in restoring the sense of it, must be left to the judgement of the candid reader. I add the words of the original. "Et pur l'intent il appiert pleinement, car si le dit Hospital ad estre dissolve, sans subsequent act de Parliament il ad estre deins le purview del dit clause, et

"quant ceo fuit apres per act de Parliament pur ceo que les freres ne fueront present de faire surrender, car ne ferra ceo deins l'intent; car l'intent fuit pur extender le dit clause a tout Monasteries, &c. dissolve solongue le dit statute, ou queux fueront en possibilite de estre dissolve solongue le dit statute sont deins l'intention del'ley."

they had at the time when the exemption was granted, and not to lands acquired *de novo*. But, as it appears by the statutes of 2 H. 4. and 7 H. 4. several bulls were procured against this constitution, and those were made void by the statutes. The nature of this privilege is expressed in PANORMITAN, *in capite ex parte de decimis*, in his exposition upon the decretal, namely, *quod istud privilegium non solvendi decimas datur solis Cisterciis, Templariis, et Hospitalariis*. 2. *Ex prædiis quæ manibus suis propriis colunt*. 3. *Et non de prædiis quæ ab aliis conduxissent*. 4. *Vel quæ aliis pro certo redditu vel censu locassent*. *Et istud privilegium est personale : et omnia privilegia personalia non egrediuntur ultra personam*. And this privilege, and all other privileges *certam habent interpretationem*. And Whitlock from these grounds framed his reason, that this privilege, being personal, does not go beyond the person to whom it was granted : therefore, when the person, namely, the corporation, was dissolved, the privilege was gone : as in the case of 3 E. 3. of an appropriation to the Templars ; that corporation was dissolved, and by the dissolution the appropriation was gone also. And by the grant in general of all privileges to the king by the statute of 32 H. 8. this particular and personal privilege was not given to the king. The statute of 31 H. 8. gives all the privileges of the monasteries to the king ; but that was not sufficient : therefore a particular clause was added, not as a gift of the privileges, but, that if the lands were exonerated of the payment of tithes at the time of the statute of 31 H. 8. then the king should hold them exonerated of tithes. 2. He said, also, that if this personal privilege was given to the king by the statute of 32 H. 8. that extends only to the king, his heirs and successors, and not to the grantees of the king : for it shall be personal in the king, his heirs and successors, as it was in the Hospitallers and their successors.

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Hyde C.J. *Dodderidge and Jones e contra*, that by the statute the privilege was given to the king. This immunity, which the Hospitallers had, was a privilege within a privilege, and *privata lex*, or *privatio legis*, an exemption from the general law, which was, that every one should pay tithes. It is true, that a privilege does not extend *ultra personam*, and if the corporation be dissolved, the privilege will be so likewise : but since an act of parliament gave this privilege to the king before the corporation was dissolved, the king shall have it as a grant to him by act of parliament. And Jones compared this case to the case of the appropriation ; if the corporation is dissolved, the appropriation is gone, as appears in the said case of 3 E. 3. And *Dodderidge* said, that when the Templars were dissolved, their privileges were gone by the dissolution ; but their lands reverted to the patrons and lords of whom they were holden : but by 17 E. 2. those lands were given to the Hospitallers ;

1627. and though (as it appears by the said council of *Lateran*) of lands *de novo acquirend'* tithes ought to be paid; yet of this land, which the Templars purchased (though it was *de novo acquisit'*) they should not pay tithes, because they enjoy the same privilege. Which proves, as he said, that a privilege, though personal, may be transferred to another. But *quære* of that; for not a word of privilege is in the act. But, if an appropriation be given to the king by an act of parliament, before the corporation is dissolved, there it is good, as was resolved in *Wright's case* aforesaid, 8 *Ja.* But, if the corporation be first dissolved, and thereby the appropriation gone; there, a general grant by an act of parliament will not save it, as it was holden in the same case: though by special words it might be; for all appropriations annexed to monasteries dissolved after 4 *Feb.* 27 *H.* 8. and before the 31 *H.* 8. were gone, but by a special clause in 31 *H.* 8. they were revived, namely, that the king should have the impropriations in the same plight as they were at the day of the dissolution of the monasteries; and then the appropriations were *in esse*, and not determined. In the same manner for these privileges; if the corporation had been dissolved first, and then all privileges given generally to the king by the statute of 32 *H.* 8. the king would not have this privilege: but, since it is given before the corporation * was gone, the grant is good enough: and though the king shall not have the privilege *idem numero*, yet he shall have it *idem specie*, that is, the king shall hold the lands discharged, as the
- [424] Hospitallers held them: he shall have such privileges as the Hospitallers had: as in the case of 20 *E.* 3. *tit. Avowrie*, and the case
- Co. 24. of the abbot of *Strata Marcella*, where the grantee was to have *tot, talia, &c. libertates, privilegia, &c. quot, qualia, &c. dictus nuper abbas tenuit, &c.* they are not *the same* liberties, but *such* liberties. And the objection upon the statute of 31 *H.* 8. for the addition of the clause of discharge, is of no force: for that was *ad majorem cautelam*, and it was also to give a discharge in other cases, than in the case of privilege, namely, in case of discharge by prescription, composition, or perpetual unity, and other discharges. 2. This exemption will extend to the patentees; for it is not a personal privilege in the king, but a real discharge of the land given by the statute, which goes with the land, into whose hands soever the land shall fall; for the privilege is *quamdiu propriis manibus excolunt*; and when the king grants over, it shall be *propriis manibus* of the patentee, as it is resolved in 10 *Eliz.* And because the three judges
- Supra 132. agreed, that the lands in question were discharged, judgement was given against the plaintiff, and for the defendant. (a)

(a) See on the general point *Stathome's case*, Dy. 349. b. *supra*, 136. *Nash v. Molin's*, Cro. Eliz. 277. b. *supra*, 132. *Parson of Pykirk's case*, Dy. 206, *supra*, 162. 250. *The Serjeant's case*, *supra*.

Hil. 1 Car. A.D. 1627. B. R.

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Mountford v. Sidley. [3 Bulstr. 336.]*Mountford*
v.
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IN an action of trespass for the taking of three loads of oats, the defendant in his bar saith, that the place where, &c. is parcel of a copyhold in *T.* and makes title to it, and justifies for damage-feasant. The plaintiff replies, that long before, and at the said time when, &c. he was parson of *T.* and that the place where, &c. is within his rectory and the tithable places thereof; and that the defendant, being a copyholder there, let it to one *Hawkes*, to hold it from year to year, as long as both parties should please, and that *Hawkes* entered and ploughed and sowed and took the crop, and set out the said oats for his tithes; and that the defendant of his own wrong took the said oats at the said time when, &c. The defendant rejoins, and protesting that the oats were not set forth for tithes, traverses the demise to *Hawkes*. To this traverse the plaintiff demurred.

This state
of the
pleadings is
extracted
from *Croke's*
report of
the case in
the Exche-
quer Cham-
ber.
Cro. Car.
64.

Whitlock justice.—The traverse is not good, and, upon consideration of the whole matter, judgement ought to be given for the plaintiff. The defendant hath admitted, that the plaintiff was parson; and hath also admitted, that the oats were set out for tithes, and that he took them. The case is no other than this; that corn is set out for tithes, and the owner of the land takes it as damage-feasant, without making it to appear in pleading (as he ought to have done) that the parson had suffered the corn to remain over-long upon the land to his damage. The parson may have an action of trespass for the taking away, if once they were set out for tithes, and after taken away. The defendant here disclaims any title to, or property in, the corn; he claims nothing in it, but he admits the plaintiff to have the sole property. Where he disclaims for damage-feasant, he ought specially to shew, that the same remained there so long, that by it there was a damage to him; and lawful it is in such a case to distrain corn in the shocks; but not so for rent; and so the difference is taken 10 *H.* 7. 21 *H.* 7. and 22 *E.* 4. 50. As to the traverse here taken, it is not a material traverse, and so for this cause not good, the same being *absque hoc* that *Sidley* demised unto *Hawkes* for one year; which is no way at all material. He needs not to take notice of his title in an action on the statute of 2 & 3 *E.* 6. for not setting out tithes: he is not to lay and set forth a title in the defendant: he needs only to state, that he was possessed without shewing any title, and that is sufficient. Here the defendant by

1 Jon. 89.
S.C.

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See the
latter sta-
tutes contr.

pra. 281. *Cornwallis v. Spurling*, Cro. Jac. 57. *pra.* 250. *Fesset v. Franklin*, Sir Tho. Raym. *supra*, 224. *Hanson v. Fielding*, Gilb. Equ. 225. *infra*, 1579. *Star v. Elliott*, 1 Freem. Rep. 225. *infra*, 683. *Urrey v. Bowyer*, *su-* 229.

1627. his traverse admits the plaintiff to be parson ; so that the traverse is not good, and judgement ought to be given for the plaintiff.

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Jones justice.—It doth not appear here in the declaration, whether the plaintiff hath brought his action, as parson, or otherwise ; and therefore the defendant might well plead in bar, for the parson ought to make his title. The parson, where tithes are set out, hath a liberty for a time convenient to come and carry them away, and this conveniency of time is triable by a jury. And this is a licence, which the law gives him, and if he exceeds it, he shall be subject to an action, and then, by the judgement of law, he shall be taken for a trespasser *ab initio*. Otherwise it shall be of a licence in *fait*, given by the farmer himself ; if he exceeds this, no action of trespass lies for it, but an action on the case ; and this difference is taken in *The six Carpenters case*, 8 Rep. 146. If an action is brought for taking away tithes, the defendant ought to plead specially, either that they were not set out for tithes ; or, that being set out, they were suffered to remain there over-long. Here the parson makes his title in his replication. As to the traverse by the defendant of the demise to him who set out the tithes, this is a bad and an impertinent traverse. If one, who has some colour of title, [426] sow the land, and set out the tithes, though he be a disseisor, this is good for the parson : otherwise it is, where one without any colour sets out tithes ; this is no setting out in law. Here the traverse being of a particular inducement to the title is not good ; and the traverse being bad, judgement ought to be given for the plaintiff.

Dodderidge justice.—The traverse is bad both for the matter and the manner of it. As touching a traverse, that thing is to be traversed, which goes to the point of the action ; any other traverse is not good, because not material. To the title of the plaintiff here, the demise to *Hawkes*, be it for one year, or for half a year, is not material ; and for this cause the traverse is not good. The defendant might have said, that the plaintiff was not parson ; or, that it was not in his parish ; or that it was not severed from the nine parts. If any of these were so, the same would have well served his turn, and a material traverse might have been upon any of these. But here he hath traversed a thing merely immaterial. As to the manner of the traverse ; the traverse is here also void for the manner of it ; for he hath here traversed a conveyance only, and nothing else ; and this is not good. He doth here traverse only the conveyance to the title, which enables him to have the tithes, and therefore this traverse is not good. Also, the traverse is not good, because he hath here taken a captious traverse, the same being *absque hoc*, that he demised to *Hawkes* for one year. So that, upon the whole matter, the traverse is bad both ways,

both for the matter and the manner of it; and therefore judgement ought to be given for the plaintiff.

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Crew chief justice. — The defendant hath here allowed a good title in the plaintiff to the oats. If it appears by the declaration, that the plaintiff was parson, then by the bar the defendant ought of necessity to shew the cause of his taking for damage-feasant. But here, as this case is, he needs not do it, because the plaintiff does not bring this action, as parson; but in his replication makes his title, as parson. The traverse here is not good. If the corn had continued there over-long, the defendant's remedy had been by action on the case. But, here, no title appears but only for the plaintiff. So the traverse is bad, and judgement ought to be given for the plaintiff.

Upon this judgement a writ of error was brought; and the error assigned was, that the plaintiff alleged, that he was parson *tempore quo*, &c. and at the time of the trespass supposed, *ac diu antea*; but did not say, that at the time of the severance of the corn he was parson; for it shall not be intended without showing it; but rather, that he was parson at the time of the trespass, and not at the time of the severance, and then he made not a sufficient title to the tithes. But all the justices and barons conceived it was well enough; and it shall be intended by all the circumstances, that he was parson at the time of the severance; for it is said, *antea et tempore quo fuit parson, et adhuc est*, &c. and especially the defendant having admitted that he was parson, and the said tithes due unto him, and making a traverse of the lease, which was an idle traverse, and therefore good cause of demurrer. And the replication is good; for being pleaded that *diu antea et tempore quo*, &c. he was parson, it is certainly enough intended, he was parson at the time of the severance, as well as at the time of the taking. Whereupon judgement was affirmed, notwithstanding the book, 35 H. 6. 48. which was much insisted upon.

Cro. Car.
64.

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H. 2 Car. A. D. 1627. C. B.

[*Littleton Rep.* 13.]

A LIBEL was in court christian for tithes of hay: the defendant said, that the hay was growing upon headlands and butts in corn fields: and it was agreed by *Hutton* and *Yelverton*, who were the only judges then in court, that a prohibition should be granted: for the defendant is discharged of tithes in this case of necessity. This part is left for the turning of the plough, and is part of the ploughed land, of which the parson has tithe of corn, and he could

Per Richardson arguendo.
No tithes due for hay from headlands in corn fields.

1627. not plough his land, if it were not left. And this is the reason of the case of 22 E. 4. 8. (a)

No tithes due of rabbits killed for the use of the owner's family.

A libel was in the ecclesiastical court for tithes of rabbits, which the party killed only for his family. And it was agreed, that tithe shall not be paid for rabbits killed to be eaten in the house; any more than for fat cattle fed, and killed for the house, and therefore a prohibition was granted. (b) So in the next term it was agreed, that no tithes are due for conies by the common law, but only by the custom of the place.

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Tr. 3 Car. A.D. 1627. C.B.

Anon. [Littlet. Rep. 40.]

Tithes are not due of pigeons eaten in the owner's house, nor of acorns eaten by his pigs. See *Flower v. Vaughan*, Hct. 147. S.P. as to pigeons. 1 Roll. Abr. 642.

A PARSON libelled in the spiritual court for tithes of pigeons and acorns; and the defendant prayed a prohibition, because the pigeons were expended in his own house, and the acorns dropped from the trees, and his pigs eat them. By the court—Acorns are tithable, 11 Rep. 49. But then they ought to be gathered and sold. And a prohibition was granted. (c)

Tr. 3 Car. A.D. 1627. Cam. Scac.

Norton v. Clarke. [MSS. Calthorpe.]

The tithe of woad is a predial tithe. But Qu. Whether an action on the statute of 2 & 3 E. 6. will lie for not setting it out.

A WRIT of error was brought in the exchequer chamber for the reversal of a judgement for *Clarke* in an action by him against *Norton* upon the statute of 2 & 3 E. 6. The first error that was assigned was, that there was no averment that the tithes in question had been paid by the space of 40 years according to the words of the statute, which require that "every of the king's subjects shall from henceforth truly and justly without fraud or guile divide, set out, yield, and pay all manner of their predial tithes in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid within 40 years next before the making of this act, or of right or custom ought to have been paid;" and if they were not paid, or of right ought not to have been paid within 40 years next before the making of the statute, then an action upon the statute will not lie.

The second error that was assigned was, that an action of debt upon the statute would not lie for tithes of woad, because woad,

(a) 2 Inst. 652. 1 Roll. Abr. 645. *Chapman v. Barlow*, Bun. 183. *infra*, 657. *Degge's P.C.* part ii. ch. 3. *Tunstall*, *ibid.* n. *Williamson v. Lord Lonsdale*, 5 Pri. 25. *infra*, vol. ii. *Walton v. Tryon*, *infra*, 840. Toller on Tithes, 120. n. *Degge's P.C.* part ii. ch. 8.

(b) See *Underwood v. Gibbon*, Bun. 3. *infra*, 1582. *Hele v. Bragg*, *infra*, 861. *Robinson v. Knight v. Halsey*, *infra*, 1554.

according to *Speed*, in his *Chronicle*, is but an herb, and so in the nature of a small tithe, for which an action of debt upon the statute will not lie. For an action of debt will not lie for tithes of onions, radishes, &c. though they grow in a field; for they are small tithes. In *M. 18 Ja. in the case of Payne and Nicholson* it was adjudged, that an action of debt would not lie for the tithes of wool and lamb. And Sir *Thomas Crewe*, the king's serjeant, said, that tithes are great or small *secundum quid*. For in some places those tithes may be said to be great tithes, which in other places are small tithes. Where the tithe of a thing is *magnus ecclesiæ proventus*, there, it shall be reckoned among the great tithes: but, where it is *parvus ecclesiæ proventus*, it shall be a small tithe. And therefore in *France* the tithe of grapes is reputed among the great tithes, because it is *maximus ecclesiæ proventus*; whereas in *England* the tithe of grapes is reckoned among the small tithes, because it is *parvus ecclesiæ proventus*. And in the case at bar, because woad is not a thing frequently nor generally sown, it cannot be said to be *magnus proventus ecclesiæ*, and therefore is to be ranked among the small tithes. Upon a special verdict in one *Tyndall's case in C. B.* it was adjudged, that the tithe of woad is a small tithe, and that it belongs to the vicar. And some tithes which *ratione speciei* may be predial tithes, and not small tithes, yet *ratione loci* may be small tithes. For which reason if peas, or such sort of grain be sown in a garden, the tithes of them may *ratione loci* be small tithes; whereas if they were sown in a field, they would be said and reputed to be among the great tithes, as being predial tithes.

Binge serjeant e contra.—He contended 1st. that notwithstanding woad was not a thing known at the time of the making of the statute, yet tithes ought to be paid of it, if it be in its nature tithable: for if it had been sown at that time, tithes must have been paid for it: and, therefore, it being sown at this day, tithes shall be paid of it. Saffron was not a thing commonly known at the time of the making of the statute; yet, because it was in its nature tithable, tithes without denial are paid of it at this day; and so, by consequence, the count is good enough without any averment. *Quod fuit concessum per curiam*; for if tithes of right ought to have been paid for a thing, if it had been in being at the time of making the statute, tithes shall be paid of it at this day.

In the next place, he conceived, that the tithes of woad are predial tithes, because it is a plant or herb which arises *ex prædio* and out of the soil; and he found by *Rebuffus* in his 8th question *de decimis*, that it is taken as a general rule, *quod quicquid oritur ex prædio, decimæ ejusdem sunt prædiales*; and of these predial things there are *fructus naturales*, which grow naturally without the industry or labour of man, as grass, fruit, herbs, &c. and *fructus artifi-*

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v.
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Cro. Car.
28. *Hutt.*
77. This case cannot be urged as any decision upon the point, the special verdict being so short, so entirely devoid of any circumstance; that the court could not but give judgement for the defendant, the vicar.

1627.

Norton
v.
Clarke.

[430]

ales vel industriales, to the growth of which the industry and labour of man are requisite, as corn, woad, hemp, flax, &c. And the tithes of each of these are called *decimæ provenientes & decimæ fixæ*, because they arise *ex fructibus stirpis in terrâ fixæ*. And there are also tithes of a mixt nature, which are called *decimæ renovantes super terram*; as the tithes of wool, lamb, calves, &c. for they receive their aliment and nutriment from the earth and the fruits of it, though the things whereof the tithes are demanded do not proceed from the earth. And of these predial and mixt tithes, the tithes shall be said to be great or small *ratione temporis et ratione loci*; for prescription and the usage of the place may make those tithes to be great tithes, which had otherwise been small tithes. There are also personal tithes, which are tithes proceeding from the labour and industry of a man, as the tithes of the fees of a lawyer, physician, attorney, &c. or of a man's salary. These tithes follow the person, and are neither *decimæ exeuntes de terrâ*, nor *decimæ renovantes super terram*. The tithes of fish in a river are said to be personal tithes, because *mutant locum* from one place to another, and are not circumscribed to any place certain: but the tithes of fish in a pond are predial, for they are circumscribed in a place certain, *et non possunt mutare locum*. And there is a difference in many respects between predial, mixt, and personal tithes: for predial and mixt tithes are to be paid, whether the possession of the things, whereof the tithes are demanded, be just or unjust: but personal tithes are not to be paid but *per justum possessorum*: and therefore tithes are not to be paid of a harlot's hire, or of gains made by robbery, or other illegal courses: for such is *turpe lucrum*, which is hateful to God and man. Predial and mixt tithes are to be paid *sine deductione expensarum*; whereas personal tithes are to be paid *deductis expensis*. There cannot be a prescription *in non decimando* concerning predial and mixt tithes, unless it be a prescription by an entire country; but there may be a prescription *in non decimando* concerning personal tithes. And debt upon the statute of 2 & 3 E. 6. will not lie for not setting out personal tithes, as it will for the non-payment of predial tithes, and of tithes of woad, which are predial.

Walter, Hutton, and Harvey, justices, were of opinion, that the tithes of woad are predial tithes.

The case was argued again in the following term; and it was agreed, 1st. that no tithes are tithes within the statute of 2 & 3 E. 6. for the subtraction of which an action upon that statute will lie, but predial tithes. 2. It was agreed, that the tithes of woad are predial tithes, *nam oriuntur ex prædio*; and therefore they cannot be other than predial tithes, according to *Doctor and Student* 69.(a)

(a) Di. 2. ch. 55.

And *P. 1. Ja. Rot. 1119. Cooke and Southby's case*, in *C. B.* it was resolved, that tithes of apple-trees are predial tithes, and that debt upon the statute of 2 & 3 *E. 6.* lies for the subtraction of them. 3. There was a difference of opinion, whether an action of debt upon the statute of 2 & 3 *E. 6.* would lie for not setting out such predial tithes as are in their nature small tithes. And the better opinion of the justices and barons was, that an action would well lie. However, as *Hutton, Harvey, and Walter*, seemed to be of a contrary opinion, it was adjourned for that point.

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v.
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3 Car. A.D. 1627. In Ch.

Yate v. Southby. [1 Ch. Rep. 25.]

A BILL of review brought to reverse a decree for tithes made by the lord *Ellesmere*, in respect the plaintiff hath had a verdict at law, and sentence in the ecclesiastical court, since the decree; this court could not reverse the decree, notwithstanding any thing urged against it.

Chancery refused to reverse a decree for tithes.

4 Car. A.D. 1628. In Ch.

Browne v. Thetford. [1 Ch. Rep. 27.]

THE bill is to maintain the prescription of a *modus decimandi*, to which the defendant demurred, and says it is proper for the common law, or the ecclesiastical court. This court allowed the demurrer, and dismissed the bill. But note the time, &c. such bills having been often allowed, both before and since.

Demurrer to bill for the prescription of a *modus decimandi*, allowed.
1 Chanc.

Rep. 27. But *quære*, & *vide ante & post.*

H. 4 Car. A.D. 1628. C. B.

Scott v. Wall. [Hob. 247.]

THE plaintiff had a prohibition, containing, that where he had 20 acres of wheat, and had set out the tenth part of it, the defendant pretending, that there was a custom of tithing, that the owner should have forty-five sheaves and the parson five, had sued for that, whereas there was no such custom: but the court said, that the *modus decimandi* must be sued for in the ecclesiastical court, as well as the very tithe, and if it be allowed between the parties they shall proceed there; but, if the custom be denied, it must be tried at the common law; and if it be found for the custom, then a consultation must go, otherwise the prohibition standeth.

A *modus* must be sued for in the spiritual court as well as the tithe in kind.
Hob. 133.
S. C. *Noy*
81.
2 Ventr.
239. S. P.

1628.

*Farmer**Shereman.*

Dismissed of
abbey lands,
entailed be-
fore the
statute

31 H. 8.

Heti. 133.

S.C.

* [492]

H. 4 Car. A. D. 1628. C. B.

Farmer v. Shereman. [Hob. 248.]

THE case in prohibition was, that an abbot having a privilege to be discharged of tithes *quamdiu manibus propriis* in the time of E. 4. made a gift in tail, and 31 H. 8. the abbey was dissolved. The question was, whether the donee of the issue should be discharged. It seemeth clear he shall not be discharged; for the statute dischargeth none, but as the abbot was discharged at the time of the dissolution: so that they must claim the estate and discharge under the abbot, since the statute. So, if by a common recovery the reversion had been barred before or after the statute. But, if the land had returned to the abbot or king, before or after the statute, the case had been otherwise.

H. 4 Car. A.D. 1628. C. B.

Napper v. Seward. [Hob. 248.]

Prohibition
to a suit in
the ecclesi-
astical court
to make
proof of a
custom of tithing in *perpetuam rei memoriam*.

NAPPER against *Seward* a parson, had a prohibition against his parishioners, that libelled in the spiritual court to make proof by witness there of divers manner of tithing, *in perpetuam rei memoriam*. A strange attempt!

custom of tithing in *perpetuam rei memoriam*.

H. 4 Car. A.D. 1628. C.B.

Hide v. Ellis. [Hob. 250.]

Prohibition
for the se-
cond hay-
tithes having
been paid
for the first.
Heti. 133.
S.C.

PROHIBITION for *Hide* plaintiff against *Ellis*, farmer of the rectory of *Shinfield* in *Com. Berk.* and prescribed, that all tenants and occupiers of the meadow had used to cut the grass and strew it abroad called tedding, and then to gather it into winrows, and then to put into grass cocks in equal parts without fraud, and then to set out every tenth cock great or small to the parson, in full satisfaction, as well of the first, as of the latter making; upon traverse of the custom, it was found for the plaintiff. And exception was taken that the custom was void, because it contained no more than every owner ought to do, and so no recompence for the second making: but the court gave judgment for the plaintiff. For tithe naturally is but the tenth of the revenue of my ground, not of my labour and industry, where it may be divided; as in grass it may, though not in corn: and in divers places they set out the tenth acre of wood standing, and so of grass (a): and so here the jury having found this form of tithing to be the custom there,

(a) Over-ruled in *Knight v. Halsey*, *infra*, 1531.

it is well. (a) And the like judgement was given upon the like custom in the king's bench, *P. 2 Ja. Rot.* 191. or 192. between *Hall* and *Symonds*. (Qu. whether not *Hall v. Fettyplace*, *supra*, 222.) 1628.

Hide
v.
Ellia.

Tr. 4 Car. A.D. 1628. In Scac.

[433]

Dr. *Burgess v. Symons*. [Litt. Rep. 102. 141.]

DOCTOR *Burgess*, parson of *St. Magnus* upon *London* Bridge, sued here, upon the decree confirmed by the act of parliament of 37 *H. 8. c. 12.* concerning tithe in *London*, for tithes; and for privilege, shews, that the king has four nobles a year revenue out of it. There was a demurrer to the jurisdiction; and for the doctor, precedents were alleged; one of 14 *Ja. 1.* where the parson of *St. Botolph's* without *Bishopsgate*, being impropiator upon a grant in fee farm, sued here; *Coventry* being recorder at this time, of counsel with the against the parson.

Qu. Whether there may be a suit in the exchequer for tithes of houses in *London* upon the statute of 37 *H. 8.*

Supra 285.

Finch, recorder. — Those precedents might be of tithes claimed by custom; and for such, they may well sue here, or in court christian; but, for tithes grounded on the statute, or which have their commencement from the statute, and *not otherwise*, they ought not to sue by any other method, than that which the statute directs, nor before any other than the judge appointed by the statute. And as for tithes for houses, there are none, unless the same be given by this decree, any more than there were tithes payable for a mill, before the statute of *Articuli Cleri*; but newly-erected mills pay tithes: for no tithes are due for freeholds by common law; and yet at common law, wood and underwood were tithable, though, before the severance, it was parcel of the freehold, and so says *Doctor and Student*. (b)

And it appears also by a record, which I have seen, of 2 *R. 2.* among the parliament rolls, whereby the commons pray, that wood may be ascertained, for they say that before the great plague, no tithe was paid for any sort of wood; but this was altered by the statute of *silva cædua*, 50 *E. 3.* and it was first obtained at the constitution of *Winchelsey*. And at this day no tithes are payable for mines and quarries, unless by custom; so that there is no other foundation, in the present case, but the above decree affirmed by parliament, by which no court, but the mayor of *London*, can take cognizance of it. And to this purpose is the case of *Scudamore* against *Bell*, 5 *Ja. 1.* where upon debate a prohibition was awarded. And this case was compared to that of the orphans of *London*, where the court will award a prohibition, if any spiritual court interferes with their estate, though it be only by private custom.

Supra 8.

Supra 5.

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Supra 227, 228.

(a) *Fox v. Ayde*, 2 *P. Wms.* 522. *infra*, 697. 1561. *Newman v. Morgan*, 10 *East*, 5. *infra*, vol. ii. *Portinger v. Johnson*, *supra*, 286.

(b) *Di. 2. ch. 55.*

1628. *Walters*, 38 Ass. The king's farmer sues here for tithes; so that this court may hold plea of tithes in some cases; and there have also been cases, in which the question was, whether tithes should be paid upon letting on lease houses in *London*, with great fine and rent; and for this particular, this court has had jurisdiction; but we will advise further. (a)

Dr. Dargen
v.
Symons.

In the next term the case was argued again; and *Walters* said, that he willingly gave up the great question of jurisdiction, having inquired what the case was, between the parson and the other. And it appeared, that the parishioner farmed an house at five pounds rent, and as it stood empty, he, not being able to get a tenant by reason of the great plague, would not therefore, during that time, pay tithes.

But *Walters* said, as this was the case, he would advise him to pay tithes; and further, that he could shew the case adjudged, where one leased an house in *London*, rendering rent, and afterwards purchased the same house in fee, though no rent was paid for it, yet the parson shall have tithes, according to the rent paid last. But, if one builds a new house, and inhabits it, or leases it rent-free, the parson shall not have tithes nor remedy. And this is not the great case, so much litigated, whether tithes shall be paid for the increase of rent, when the lessee makes under leases, reserving greater rent (b); nor the case of tithes according to the fine taken for the lease, which has been lately resolved (c); and therefore he advised the defendant to agree with the parson, and pay his tithes.

Qu. when
resolved.

M. 4 Car. A. D. 1628. In Scac.

The Parson of *St. Botolph's* case. [Litt. Rep. 141.]

Privilege of
the exche-
quer, as the
king's lessee
disallowed,
because the
estate under
which the
party claim-
ed the pri-
vilege, was
out of the
king.

* [435]

THE case of the parson of *St. Botolph's* without *Bishopsgate*, who sued here for tithes, was moved now again. *Noy* said, that if one be bound to the king, by covenant, with condition to do such a thing, he may, before a breach, sue here; and so, for * the same reason, may every one, who holds land of the king, by rent-service, either for the repair of a bridge, or of a causeway, or of an highway, &c. for in these cases they can the better perform their services, if they are paid by their debtors, &c. and so, by this means, all cases may be drawn into this court, if, upon the other point, the lessee of the farmer be privileged. But the court dismissed the bill, and declared their reason to be solely,

(a) *Langham v. Baker*, Hardr. 116. *infra*, 511. *Unfreville v. Batchelor*, *infra*, 548. *Sayer v. Mumford*, *infra*, 546. *Kynaston v. Miller*, *infra*, 903. *Ivatt v. Warren*, *infra*, 1054. *The Warden and Minor Canons of St. Paul v. Crickett*, 2 Ves. 563. *infra*, vol. ii.

(b) Probably the case of *Meadhouse v. Taylor*, *Noy*, 130. *supra*, 329. n.

(c) Probably the case of *Dunn v. Durrell and Goffe*, *supra*, 299.

because the parson *impropriate* held the reversion, and the fee-farm was entirely granted out of the king; and now the king cannot take advantage of this covenant. And they waived all the other questions, *viz.* whether tithes may be sued for, here; whether the parson is privileged for houses in *London*; and whether, feoffee of fee-farmer shall have privilege here; and only ordered the cause to be dismissed.

1628.

*The Parson
of St. Bo-
tolph's Case.*

T. 5 Car. A. D. 1629. B. R.

Edgar and Street v. Sorrel, Street, and others. [MSS. Bridgeman. (a)]

IN an action of trespass upon the opening of the cause upon demurrer, it was holden by the court, that a rectory might be without glebe. For by *Hyde*, the parson may convey away all his glebe; and he said, that he had seen several compositions between the vicar and the parson, by which the parson gave all his tithes and glebe to the vicar, and reserved a rent only for himself. And by *Whitlocke*, originally a parson might be without glebe. For the common law upon creating a parson gave him tithes only, and the glebe is only an additament to him *ex dono fundatoris*.

Cro. Car.
169. S.C.
A rectory
may be
without
glebe.

M. 5 Car. A. D. 1629.

[MSS. Bridgeman.]

NOTE, *Jones* said, that an impropriator may sue the vicar in the spiritual court, or the vicar the impropriator, just as if he were a spiritual person; and that it had been adjudged, that no prohibition lies.

M. 5 Car. A. D. 1629. In Ch.

[436]

[Nels. Ch. Rep. 10.]

THE bill was to establish certain customs of tithing within a particular parish, the plaintiff alleging, that there were such customs, and setting them forth at large in his bill.

The defendant, by his answer, denied the customs; and alleged, that it was not proper for a court of equity to determine whether there were any such customs or not; that the bill was in nature of a prohibition at common law; and in a case where such a prohibition had never been granted, or the custom tried; and therefore the bill was dismissed. (b)

Bill to es-
tablish cer-
tain cus-
toms of
tithing dis-
missed, be-
cause it had
never been
tried at law,
whether
there were
such cus-
toms or not.

(a) This case is extracted from some manuscript Reports of Sir Orlando Bridgman in Mr. Hargrave's collection. The volume reaches only from *Easter, 5 Car. 1.* to *Easter 13.* of the same reign. (Hargr. Bibl. Brit. Mus. No. 40.)

(b) On bills to establish a modus, see *Coventry v. Burslem*, *infra*, 1596. *Howell v. Franklin*, *infra*, 1348. *Wake v. Congers*, 1 Eden, 334. *infra*, vol. ii. *Gordon v. Simpkison*, 11 Ves. 509. *infra*, vol. ii. *Woolston v. Wright*, Anstr. 802. *infra*, 1412. 1423.

1629.

H. 5 Car. A. D. 1631. B. R. Rot. 693.

Alden

v.

*Tothill.**Alden v. Tothill.* [MSS. Calthorpe.] (a)

Whether an appropriation since 25 H. 8. of [437] a rectory to a lay corporation be good.
2. Whether an appropriation in default of the endowment of a vicar be good.

THE plaintiff declareth that 20 Jul. 5 Car. he was and yet is rector of the parish church of *Exminster*, and that 4 Oct. 4 Car. the defendant was and yet is seised of one messuage and 800 acres of land in *Exminster* in fee; of which 800 acres of land, time out of mind, the tithes of grain, growing thereupon, were payable unto the rector of the church aforesaid, or his farmer or deputy, when they were sown: that the defendant being seised of the messuage and 800 acres of land in form aforesaid, 10 Ma. 5 Car. did sow 130 acres of them with grain, viz. 30 acres with wheat, 30 acres with rye, 30 acres with barley, 30 acres with oats, and 10 acres with beans and peas; which 130 acres so sown within the space of 40 years last past did use and ought to pay tithes of corn unto the rector of the church aforesaid, his farmer or deputy: that the defendant being the subject of the king, and knowing the tenth part of the several grains to belong unto the plaintiff, on the last day of Sept. 5 Car. at *Exminster* aforesaid, the aforesaid several tithes of grain to the value of 90*l.* growing upon the said 130 acres of land, did not divide or sever from the nine parts, nor did otherwise agree with the plaintiff, being rector of the church aforesaid: but that the defendant, being a subject of the king, on the last day of Sept. 5 Car. the tithes aforesaid of the said 130 acres in form aforesaid sown, did take and carry away against the form of the statute; by which an action hath accrued to the plaintiff to require of the defendant 90*l.* for the treble value of the tithes aforesaid, according to the form of the statute so made and provided; and he

(a) This case was argued several times by the greatest lawyers, both common and civil, of the time; by *Mason*, *Finch*, *Jermyn*, *Brampston*, *Calthorpe*, and *Dr. Eden*, for the plaintiff; and by *Ball*, *Noy*, *Littleton*, *Henden*, and *Dr. Duck*, for the defendant. The last argument appears to have been in Mich. 8 Car. and the first in Hil. 6. The state of the case, and argument for the plaintiff, which I have given in the text, are extracted from Mr. Serjeant Calthorpe's "Special Arguments," a most valuable manuscript in the collection of Mr. Hargrave.* The question is so fully, so ably, and so learnedly discussed by Calthorpe, that it seemed unnecessary to add the argument of any of the other counsel for the plaintiff. The arguments on the part of the defendant are collected partly from Calthorpe's MSS. Reports, (of which so much use has been already made), and partly from Sir Orlando Bridgeman's MSS. Reports. Calthorpe having thrown together the arguments of Littleton and Ball, the insertion of the additional topics and authorities

insisted upon by the other counsel for the defendant, was a matter of no great difficulty. It is to be regretted, that we have no trace whatever of the arguments of those very learned civilians, Dr. Duck and Dr. Eden.

Whether this important case ever received the judgement of the court no where appears. It should rather seem that it did not: for I have examined the roll, but find no judgement upon it. However, as the twelve corporators of *Crediton* have almost ever since that time been in the undisputed exercise of the patronage of this church, we may conclude that the appropriation was considered by the crown lawyers as unimpeachable. There is a slight mention of this case in *Hughes's Abridgement*, ver. *Appropriate*, and also in *Godolph. Repert. Can. 228.*: but I am not aware that there is any hint of it in any other printed law book. Some account of the charter and case is to be met with in *Polwhele's History of Devonshire*, vol. ii. 97. 110.

* Hargr. Bibl. Brit. Mus. No. 35, 36.

the defendant hath not paid the said 90*l.* (although thereunto required). To the damage of the plaintiff of 20*l.*

1629.

The defendant pleadeth *non debet*.

Alden

v.

Techill

The jury find, as to the taking and carrying away of the several tithes growing in and upon 100 acres, that *H. 8.* was seised of the rectory appropriate of *Crediton* in the diocese of *Exeter* in the county of *Devon* in fee, and of the advowson of the parish church of *Exminster* in the same county of *Devon* in the same diocese as of fee and right, in right of his crown of *England*: and that the church of *Exminster* then, and time out of mind, was a church presentative, and that the church of *Exminster* was full of the person of *John Hickes* clerk, then incumbent of the same church: and that *John Hickes* and all his predecessors, rectors of the same church, time out of mind had cure of souls within the said parish of *Exminster*: that the church became void by the death of *John Hickes*, and *H. 8.* presented one *William Leveston* to the same church being void, who was admitted, instituted, and inducted: that *H. 8.* died seised of the said advowson, and the same descended to *E. 6.*: that the king under his great seal made certain letters patent, bearing date 2 *Apr.* 1 *E. 6.* unto *Gilbert Gale*, *John Bodley*, *Robert Trowbridge*, *Robert Davy*, *John Holcombe*, *William Shilpton*, *Thomas Harris*, *John Wells*, *John Helyer*, *James Mortimer*, *John Atwell*, and *William Moxley*, being laymen, to be governors of the hereditaments and goods of the church of *Crediton*, otherwise called *Kirton*, in the county of *Devon*: the tenor whereof followeth.

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EDWARDUS sextus, &c. Sciatis, quod nos, tam ad divini cultus augmentum, ac bonorum, catallorum et hæreditamentorum ecclesiæ parochialis de Crediton, &c. meliorem preservationem et gubernationem, et ad puerorum eruditionem, quam pro aliis causis et considerationibus, nos ad quosdam subditos nostros inhabitantes ejusdem parochiæ de Crediton pro universo commodo et communi utilitate omnium et singulorum inhabitantium ejusdem parochiæ incorporand' et in unum corpus erigend' specialiter movend' et instigand', volumus et ex certâ scientiâ et mero motu nostris, pro nobis hæredibus et successoribus nostris per præsentem concedimus dictis inhabitantibus parochiæ prædictæ quod de cætero in perpetuum sint infra eandem parochiam de inhabitantibus ejusdem ecclesiæ pro tempore existent' duodecim gubernatores hæreditamentorum et bonorum ecclesiæ de Crediton. Quorum quidem gubernatorum tres esse volumus semper ex parte villatæ seu hamlettæ de Sampford infra eandem parochiam; et quod idem duodecim gubernatores in re facto et nomine in posterum sint unum corpus de se in perpetuum per nomen duodecim gubernatorum hæreditamentorum et bonorum ecclesiæ de Crediton alias Kirton in dicto comitatu Devon incorporat' et erect', ac ipsos duodecim gubernatores hæreditamentorum et bonorum ecclesiæ de Crediton alias Kirtun per præsentem incorporamus ac unum corpus cor-

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poratum per idem nomen in perpetuum duraturum realiter et ad plenum creamus, erigimus, ordinamus, facimus et constituimus per præsentes — to have a perpetual succession — persons able and capable to purchase — to have a common seal — to sue and to be sued by that name. And the king doth institute the aforesaid persons to be the twelve present governors, and if any of them die or depart out of the parish of *Crediton* with their families, to choose any other of the same inhabitants in his or their place within one month after, so that three of them shall always be of the town of *Sampford*. And he doth found a grammar-school in the parish of *Crediton*, of one master, and that it be called The king's new grammar-school of *Crediton*, and that the same master be chosen by the twelve governors from time to time after the church of *Exminster* shall become void: and that the master and his successors have perpetual succession, and be able to purchase of the governors a house for his abode and a rent of 12*l.* with a clause of distress: and if the master be absent by a month, then the governors to choose another. A grant unto the twelve governors of the parish church of *Crediton* and church-yard and site of the college of *Crediton* — *ac advocacionem et jus patronatus rectoriæ ecclesiæ parochialis de Exminster in dicto comitatu Devon, necnon eandem vicariam ecclesiæ parochialis de Crediton, et dictam rectoriam et ecclesiam de Exminster, et omnia et singula maneria, &c. glebas, &c. pensiones, portiones, decimas, fructus, oblationes, ac alia jura proficua, commoditates, et emolumenta quæcunque eidem vicario ecclesiæ parochialis de Crediton aut alicui vicario inde, ac dictæ rectoriæ et ecclesiæ de Exminster seu alicui rectori inde sive eorum alicui quoquo modo spectant et pertinent*. To hold as of our manor of *Exminster* by fealty only for all services, notwithstanding the statute of Mortmain, and the statute of the grant of First Fruits, and any other statute whatsoever. — *Et cum Willielmus Leveston clericus modo sit rector, incumbens, et canonicus possessor ecclesiæ parochialis de Exminster predictæ, eandemque ecclesiam cum suis juribus et pertinentiis universis pacifice possideat in præsentibus. Sciatis, quod nos de gratiâ nostrâ speciali ac ex certâ scientiâ et mero motu nostris, necnon auctoritate nostrâ regiâ supremâ et ecclesiasticâ, quâ fungimur, pro nobis hæredibus et successoribus nostris appropriamus, unimus, annectimus, et consolidamus præfatis duodecim gubernatoribus et successoribus suis in perpetuum predictam rectoriam et ecclesiam de Exminster cum suis juribus et pertinentiis universis; ipsamque rectoriam et ecclesiam cum suis juribus et pertinentiis universis eisdem duodecim gubernatoribus et successoribus suis in proprios usus suos pro perpetuo possidendâ donamus et concedimus per præsentibus, jure prædicti rectoris moderni inde durante tempore incumbentiæ suæ in eadem eidem rectori tantummodo salvo et reservato. Et ulterius volumus, ac auctoritate nostrâ predictâ*

necnon ex certâ scientiâ et mero motu nostris prædictis, dedimus et concessimus, ac per præsentés damus et concedimus, præfatis duodecim gubernatoribus hæreditamentorum et bonorum ecclesiæ de Crediton in comitatu Devon, et successoribus suis, licentiam, facultatem, et plenam potestatem, quòd ipsi immediatè postquam rectoria et ecclesia de Exminster prædictâ per mortem, resignationem, seu deprivationem dicti modo rectoris et incumbētis inde, aut aliquo alio modo vacaverit, seu vacare contigerit, eandem rectoriam et ecclesiam de Exminster prædictâ, ac omnia messuagia, &c. glebas, decimas, oblationes, obventiones, pensiones, portiones, fructus, libertates, et alia hæreditamenta, emolumenta, commoditates, et proficua quæcunque eidem ecclesiæ et rectoriæ de Exminster seu eorum alicui quovis modo spectantia seu pertinentia ad eorum libitum et beneplacitum sibi præfatis gubernatoribus et successoribus suis appropriare possint et valeant in perpetuum: et quòd eidem gubernatores et successores sui easdem ecclesiam et rectoriam ac prædicta messuagia, &c. glebas, &c. in suos proprios usus habere, tenere, gaudere, et convertere valeant, et possint eis et successoribus suis; et hoc absque aliquâ præsentatione, inductione, sive admissione alicujus incumbētis vel aliquorum incumbētium ad dictam ecclesiam et rectoriam de Exminster prædictâ seu eorum alteram in posterum fiend' et absque impetitione, molestatione, seu impedimento nostri, hæredum et successorum nostrorum, aut aliquorum archiepiscoporum et episcoporum vic' eschæat' justiciariorum, commissioneriariorum, aut aliorum officiariorum seu ministrorum nostrorum, hæredum vel successorum nostrorum quorumcunque; et absque compoto primitiis vel decimis, aut aliquo aliò proindè nobis, hæredibus vel successoribus nostris, quoquo modo reddendo, solvendo, vel faciendo; statuto de terris et tenementis ad manum mortuam non ponendo, aut statuto de concessione primitiarum et decimarum nobis hæredibus et successoribus nostris de beneficiis, dignitatibus, et promotionibus spiritualibus et ecclesiasticis edito et proviso, aut aliquo alio statuto, actu, ordinatione, provisione, restrictione, vel lege, ecclesiasticâ seu temporali, in contrarium antehac facto, edicto, ordinato, seu proviso, aut aliquâ aliâ re, causâ, vel materiâ quâcunque in aliquo non obstante; et absque aliquo brevi de ad quod damnum, seu aliquo alio brevi, præcepto, seu mandato nostri, hæredum et successorum nostrorum, præmissis, seu aliquo præmissorum quoquo modo prosequend' impetrand' vel fiend' et absque aliquâ inquisitione inde capiend' et in cancellariam nostram retornand'. Et ulteriùs sciatis, quod nos, autoritate prædictâ, pro nobis, hæredibus et successoribus nostris, concedimus ac licentiam damus, quod bene licebit præfatis duodecim gubernatoribus et successoribus suis, postquam dicta rectoria et ecclesia de Crediton prædictâ primò et proximè vacaverit, et ad manus et possessionem suam devenerit, præsentare unum clericum habilem et idoneum loci ordinario et diocesano fore vicarium dictæ ecclesiæ de Crediton; et ita de tempore in

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And he made a perpetual body, and to have the charge of souls in the parish of *Crediton*; and after the church of *Exminster* became void, the governors to provide a house for the vicar, and the governors to distribute reasonable sums among the poor parishioners of *Crediton* to be appointed by the bishop of the diocese, and to assign a rent of 20*l.* for the maintenance of the vicar and his successors.

— *Sciatis ulterius, quod nos, de uberiori gratiâ nostrâ, ac ex certâ scientiâ et mero motu nostris, necnon autoritate nostrâ supremâ et ecclesiasticâ prædictâ, quâ fungimur, pro nobis, hæredibus et successoribus nostris, per præsentem concedimus ac licentiam dantes, quod quamprimum dicta ecclesia et rectoria de Exminster vacare contigerit, aut quamprimum*

[441] *possessorem ejusdem ecclesiæ et rectoriæ dicti duodecim gubernatores aut successores sui adepti fuerint, &c. unum clericum habilem et idoneum loci illius ordinario ad eandem ecclesiam sic vacantem nominabunt et præsentabunt; et ita de tempore in tempus in perpetuum quoties eadem de vicario vacare contigerit. Qui quidem clericus sic nominatus et præsentatus, ac per dictum ordinarium loci illius canonicè institutus et inductus, nominabitur et erit perpetuus vicarius ejusdem ecclesiæ de Exminster.* — He made the perpetual vicar a body corporate and to have perpetual succession and the charge of souls within the parish of *Exminster*. — The governors to provide a house for him, and to distribute among the poor parishioners there a reasonable sum, and to pay him 12*l.* by the year, and power given to the governors to grant 12*l.* by the year, and a house unto the vicar of *Exminster* and his successors, — a discharge of the vicars of *Crediton* and *Exminster* of the first fruits. —

That *Edward* the sixth died, queen *Mary* being his sister and heir: that queen *Mary* died, queen *Elizabeth* being her sister and heir: that on the last day of *September* 1583, *Wm. Leveston* the rector of the church of *Exminster* died; when the governors entered into the rectory: that on the 30th of *October* 1583 the governors presented one *Wm. Randall* to the vicarage of *Exminster* unto the bishop of *Exeter*, who was admitted, instituted, and inducted: that *Wm. Randall* until 1 *June* 1625 had a mansion-house by the appointment of the governors, and after the 1st of *June* he had a house by virtue of a gift made by the governors under their common seal, and had also a pension of 12*l.* by the year granted unto him and his successors: that on the 10th of *Feb.* 4 *Car.* *Wm. Randall* died: and the jury find that there was not any other endowment until the 1st of *June* 1625: that queen *Elizabeth* died, king *James* being her cousin and heir: that *Valentine* late bishop of *Exeter* was chosen to the bishopric of *Exeter* — that on the 29th *Dec.* 19 *Ja.* there was a grant *in commendam* unto the bishop of *Exeter*, who

was afterwards consecrated: that on 13th July, 22 Ja. the king presented the bishop of *Exeter* unto the rectory of *Exminster*, who was instituted by the archbishop of *Canterbury*, and inducted by *Wm. Randall* clerk by the commandment of the archbishop: that the value of the benefice is 33*l.*: that king *James* died, king *Charles* being his son and heir: that 5 Jan. 22 Car. *Valentine* bishop of *Exeter* died: that 7 Jan. 3 Car. king *Charles* presented one *Wm. Morden* to the church of *Exminster*, who was admitted, instituted, and inducted: that 10th March, 4 Car. *Wm. Morden* died seised of the rectory prout *lex postulat*: that 16 March, 4 Car. *Wm. Randall* died: that *Joseph Hall* was elected bishop of *Exeter*; that the governors presented one *William Randall* to the vicarage of *Exminster* under their common seal: that 24th March, 4 Car. the king presented *Thomas Alden* unto the rectory of *Exminster*, who was admitted, instituted, and inducted; and the presentation was by lapse or any other title, be the church void: that 10 May, 5 Car. the defendant *Henry Tothill* sowed 21 acres of rye, 4 acres of barley, 22 acres of beans and peas, and did not set forth the 10th part from the nine parts, nor agree with the plaintiff, but on the last day of September, 5 Car. took and carried them away against the form of the statute; and that the tenth part so taken and carried away by the defendant was worth 8*l.* the treble value whereof is 24*l.* And if upon the whole matter the court shall think that the defendant doth owe 24*l.* then they find that he oweth 24*l.*; and if not, then not: and as to the 66*l.* of the 90*l.* they find that he doth not owe the 66*l.*

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The case is shortly this:

King *Edward* 6. being seised of the advowson of the church of *Exminster* in the county of *Devon* which is presentative, doth by his letters patent 2 Apr. 1 E. 6. create the corporation of the twelve governors of the goods and hereditaments of the church of *Crediton*, the same corporation consisting all of laymen; and by the same letters patent, the church at that time being full by the presentation, admission, institution, and induction of one *Wm. Leveston*, doth grant the advowson of the same church unto the twelve governors and their successors; and reciting, that *Wm. Leveston* is rector of the church, doth appropriate the rectory and church of *Exminster* unto the twelve governors and their successors, and doth grant the rectory and church unto them and their successors for their proper use; and when the church of *Exminster* shall become void by the death, resignation, or deprivation of *Wm. Leveston*, that the said governors and their successors may appropriate the said rectory and church, and convert it to their proper use, and hold and enjoy it accordingly; and this without any presentation, admission, or induction of any incumbent to the said church, and without the impediment or hindrance of the king, his heirs and successors, or any other, and without

1629. paying any first fruits or tenths: and when the church of *Exminster* shall become void, doth give power to nominate and present a clerk unto the church, who shall be a perpetual vicar of that church; and doth give power to assign a house, and 12*l.* by the year rent, unto the vicar and his successors for his maintenance. On 30 Sept. 25 Eliz. Wm. Leveston, the incumbent dieth. On 30 Oct. 25 Eliz. the twelve governors under their common seal present one Wm. Randall to the vicarage of *Exminster*, who is admitted, instituted, and inducted, and hath a house assigned unto him, and the rent of 12*l.* by the year paid unto him. On 13 July, 22 Ja. the king presents Valentine Davye bishop of *Exeter*, who hath power to take a church in commendam, unto the church, who is admitted, instituted, and inducted. On 11 June 1625 the governors endow the vicar of *Exminster* and his successors with a house and 12*l.* rent, according unto the purport of the letters patent. On 5 June, 2 Car. the bishop of *Exeter* dieth. On 7 June, 3 Car. the king presenteth Wm. Morden to the church, who is admitted, instituted, and inducted. On 10 March, 4 Car. Wm. Morden dieth. On 16 Mar. 4 Car. Wm. Randall dieth. On 24 Mar. 4 Car. Thomas Alden is admitted, instituted, and inducted.

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And I, being of counsel with the plaintiff, conceive that the judgement ought to be given for the plaintiff. For I conceive that the appropriation made by the patent of 2 Apr. 1 E. 6. unto the twelve governors, was ill in its creation; 1st, in respect that they are a lay corporation, that is to say, a corporation of laymen: 2dly, in regard that there was not an endowment of a vicar according unto the statute in that case.

As concerning the first point, which is, whether the appropriation made unto the lay corporation be good or not, I hold it is not good. 1st, In regard that after the appropriation made, there is a cure of souls remaining; and the body unto whom the appropriation is made is in law the perpetual incumbent of the same, and the parson of that church. And this lay corporation being of that quality that it cannot have cure of souls, nor be parson of the church, the appropriation made cannot be good. And that after the appropriation it remaineth parson, appears by divers books.

19 E. 3. *quare impedit* 19. Upon a *quare impedit* brought by the abbot of *M.* against the dean and chapter of *E.* and against *J. G.* and *T. W.* *J. G.* and *T. W.* pleaded, that they held the church of *D.* annexed unto their prebend, as parson imparsonnee; and so it was full by 20 years; judgement of the writ. And it appeareth by this book, that the appropriation was made unto the prebend by William the Conqueror; and there it is shewn, that the king at that time might make an appropriation; but *Herle* saith, that the law was taken otherwise now.

45 E. 3. *Darren presentement* 8. Upon an assise of *darren presentement* brought by *John Newers* against the prior of *F.* he pleaded, that he held the church in proper use, and it was full of himself days and years before the writ purchased: and the appropriation appeareth to be made by licence of the king, patron, and ordinary.

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33 E. 3. *Ayd de roy* 103. A writ of right being brought of the advowson of *H. juxta Staff.* against the dean of *Stafford*, he pleaded, that he held it as a chapel annexed unto the deanry *in proprios usus*, and that the king granted unto him the deanry; and so prayed aid of the king. And there it appeareth, that of that chapel he was in nature of a parson.

22 E. 3. 2. & 12. Upon a *quare impedit* brought by *James D'Audeley* against the abbot of *S.* of a church, the abbot pleaded, that that which is called a church was a chapel annexed to the church of *C.* which he held in proper use; and sheweth how it was appropriated; and he was driven to answer, &c.

38 H. 6. 19. & 20. An abbot, that hath a church appropriated unto him, is a parson that may have a spoliation, *juris utrum*, or other writ, as a parson; for he is both abbot and incumbent. *F. N. B.* 37.

F. N. B. 38. & 26 H. 6. *Briefe al evesque* 6. Where the defendant doth claim the advowson, as parson imparsoned, howbeit that the title be found for the defendant, he shall not have a writ to the bishop. And the *quare impedit* was brought against the master of *St. Lawrence Poultney*.

F. N. B. 49 E. If an abbot or prior be parson imparsoned of any church, and alien the land of his rectory, his successors shall have a *juris utrum* to recover this land, and not other writ; for that he shall have it as parson. And by 7 *Eliz. Dy.* 248. if part of the rectory be demanded against him, it shall be demanded against him as parson.

11 H. 4. 68. by *Thirning*, an abbot, that hath a parsonage appropriated unto his house, shall be named parson, and shall have aid, and a *juris utrum* as parson. And by *F. N. B.* 50. *F.* he ought to be named parson in the writ. 21 H. 7. 5. *Comm.* 500. *Grendon's* *Supra* 136. case.

12 H. 4. 20. Where the prior of *Burton* made title by prescription in a plaint upon an assise to a rent, the writ was abated, because he claimed it in right of his parsonage, and did not name himself parson.

19 H. 3. *Juris utrum* 16. *Provisum est coram domino rege et consilio suo, et episcopis, comitibus, et baronibus suis, quod omnes viri religiosi quicunque sint qui habent ecclesias parochiales in proprios usus, habeant de cetero assisam, ad recognoscendum utrum feodum sit libera* [445]

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21 *H.* 7. 1. 23. & 4. A parsonage that was appropriated unto the priory of *B.* which was a cell of the abbey of *Caen* in *Normandy*, stood charged with an annuity by prescription; and king *Edward* the 3d seized all the alien priories; and afterwards, by an act of parliament made in the time of *H.* 5. it was enacted, that all the lands seized in manner aforesaid, should remain in possession of the king, his heirs and successors; and afterwards king *Edward* the 4th granted the parsonage unto the dean of *St. Stephen* and his successors; and agreed there, first, that the dean ought to be charged as parson. And a difference was there taken, where there was spiritual administration: for, if spiritual administration, then a layman not capable of it; but, if not a spiritual administration, then a layman capable. And yet it was there said, that the king had several benefices in *Wales* continually in his hands, and that several lords had parsonages in their proper use: but *Frowike* saith, that they had them by the assent and agreement of the supreme head.

27 *H.* 8. 5. A parsonage, that stood charged with an annuity, was appropriated unto the master of the college of *Wyer* after time of mind; and upon a writ of annuity brought, it was holden, that it ought to be brought against him as parson, and he ought to be named parson; and the seisin being alleged after the appropriation, the appropriation need not to be shown in the count.

6 *H.* 8. *Croke* 169. (a) by *Boteler*, in case of consolidation and appropriation, the parsonage remaineth, and hath its essence: for, if the church of *Dale* hath an annuity, which is detained, and after the church is consolidated to the church of *B.* he ought to bring his writ of annuity by the name of parson of *Dale ratione ecclesie suæ de Dale* annexed to *B.*

And so it appearing by these books, that after the appropriation made, the parsonage remaineth, the incumbency and cure of souls continueth; when the corporation is of that nature, that it may not be parson, nor be incumbent, nor have cure of souls, the appropriation unto such a corporation may not be good.

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2dly. The rectory, which in its nature consisteth of glebe and tithes, is called *beneficium ecclesiasticum*, which is defined *definita et spirituali muneri conjuncta jurium ecclesiasticorum portio, certis ædibus sacris in hoc assignata, ut perpetuò per clericos ad vitam utenda clerico legitime assignetur*; whereof a layman is not capable.

I know not
whence this
definition is
taken, nor
am I sure
that I read

(a) The book here referred to under the name of *Croke*, is *Keilway's Reports*, which were edited by *John Croke*, serjeant at law.

Reg. 93. F. N. B. 49. N. the writ of *juris utrum*, which is, “*patriati sacramento recognoscere utrum sit libera elemosina pertinens ad ecclesiam, an laicum feudum,*” sheweth, that the glebe and tithes belong unto churchmen and ecclesiastical persons, and not unto laymen.

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the manu-
script cor-
rectly.

Seld. Hist. 112. The council of *Lateran* holden in the year 1028 hath this canon: “*Decimas quas in usum pietatis concessas esse canonica autoritas demonstrat, a laicis possideri apostolicâ autoritate prohibemus. Sive enim ab episcopis, vel regibus, vel quibuslibet personis eas acceperint, nisi ecclesiæ reddiderint, sciant se sacrilegii crimen incurrere.*” And this canon is iterated in the general council of *Lateran* holden in the year 1139.

Id. 113, 114. And however it is clear that anciently the use of infeodations or conveyances of the perpetual right of tithes into lay hands was frequent; and are stiled in the canon laws *decimæ laicis in feudum concessæ*, and *feudales*, and *infeudatæ*, and were mere lay possessions and determinable before the secular judge; yet, since the year 1180 and the council of *Lateran*, which is, “*Prohibemus ne laici decimas cum animarum suarum periculo detinentes in alios laicos possint aliquo modo transferre, si quis vero receperit, et ecclesiæ non reddiderit, christianâ sepulturâ privetur;*” the infeodation of tithes hath ceased, and the canon hath been received for a binding law.

Id. 107 — 8. An epistle of *Peter*, abbot of *Clugny*, to *St. Bernard*, abbot of the *Cistercian* order at *Clairvaux*, about the monks of *Clugny* their possessing of a large number of parochial tithes. The *Cisterrians* had divers complaints made against them, and one was upon this very point in these words: “*Ecclesiarum parochialium primitiarum et decimarum possessiones quæ ratio vobis contulit? cum hæc omnia non ad monachos, sed ad clericos, canonicâ sanctione pertinent: illis quippe quorum officii est baptizare, et prædicare, et reliqua, quæ ad animarum pertinent salutem, gerere, hæc concessa sunt, ut non sit necesse eis implicari secularibus negotiis; sed, quia in ecclesiâ laborant, in ecclesiâ vivant.*” And the abbot gave his reason for their enjoying of tithes thus: “*Quia monachi ex maximâ parte fidelium salutem invigilant, licet sacramenta minimè ministrant, æstimamus ipsorum primitias, decimas, et oblationes, et quæque beneficia eos dignè posse suscipere, quoniam et reliqua populo Christiano a presbyteris faciunt exhiberi.*” And another of greater note than this abbot, *viz. Peter Damien*, pretends special charity towards the poor for sufficient reason why monasteries and hermitages had tithes given to them: “*Ut copiosiora*” saith he, “*alimenta proficiant, dantur in monasteriis et eremis decimæ quorumcunque proventus, non modo pecorum, sed et ornicum pariter et ovorum.*”

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Id. 128. *Alexander* the third directed the bishop of *Amiens* to decree, that a gift of tithe by an abbot into lay hands was void; *quoniam sanctuarium de jure hæreditario possideri non debet.*

Infra.

Id. 123. Tithes are called *Res dominicæ*, and *Dominica substantia*, and *Dei census*; and by the ancients are stiled *Patrimonia pauperum*, *Tributa egentium animarum*, *Stipendia pauperum*, *hospitum*, *peregrinorum*; and the clergy were not to use them *quasi suis*, but *quasi commendatis*, as the words are of the council of *Nantes*. And Pope *Alexander* the third, in an epistle to the bishop of *Rheims*, saith, *Non ab hominibus, sed ab ipso Deo sunt institutæ*; and in another to the bishop of *Amiens*, he calleth them *Sanctuarium*.

Lindwood (a) in his title *De locato et conducto*, cap. *Licet*, &c. ver. *Portiones*, saith, "*Ante illud concilium*" (which was the council of *Lateran* holden under *Alexander* the 3d.) "*bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ vel monasterio dare; non tamen post tempus dicti consilii.*" And with this agree 10 *H.* 7. 18. 7 *E.* 6. *Dy.* 84. 2 *Rep.* 44.

The preamble of the statute of 32 *H.* 8. c. 7. doth recite, that divers of the king's subjects being lay persons, having parsonages, vicarages, and tithes, cannot by the order and course of the ecclesiastical laws of this realm sue in any ecclesiastical court for the wrongful withholding and detaining of the said tithes or other duties; nor cannot by the order of the common laws of this realm have any due remedy against any person or persons, their heirs or assigns, that wrongfully withhold or detain the same. And by this statute there is a remedy provided for laymen.

Supra 167.

2 *Rep.* 44. in the bishop of *Winchester's* case it is resolved, that none by the common law hath capacity to take tithes but only spiritual persons, or *persona mixta*: and regularly, no mere layman was at common law capable of them, but in special cases; for no layman, but in special cases, may sue for them at the common law in court christian, or for subtraction of them. But, it was there resolved; that he was capable of a discharge of tithes at the common law in his own lands, as well as a spiritual man; for the parson, patron, and ordinary might at the common law discharge a parishioner of tithes in his land; or he may be discharged by composition; but may not prescribe *in non decimando*, as a spiritual person may do.

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2 *E.* 4. 15. A temporal man may not have an action in court christian for tithes: and one that taketh a lease of tithes may have his remedy at the common law for his tithes taken away, and the court shall not be ousted of jurisdiction; for the lessee hath them as a lay chattel and in his own right.

(a) Ch. 3. x. fo. 79. a. Paris ed. 1505.

25 H. 8. *Br. Jurisdiction* 95. If the lord of a manor claimeth the tithes of such lands in *D.* to find a chaplain in *D.* and the parishioners claim them also for the same purpose; *dicitur pro lege*, the lay court shall have jurisdiction between them, and not the spiritual court. 2 *Rep.* 46. *Pigot and Heron's case*, a layman owner of tithes in this manner. 1631.

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Supra 200.

7 E. 6. *Dy.* 83, 84, 85. It appeareth, that since the statute of 32 H. 8. c. 7. a layman may have tithes, and may bring an assise or other real action for them, as he may do of any other temporal inheritance.

Lindwood in his title *De locato et conducto*, and chapter on the constitution of *John Peckham*, archbishop of *Canterbury*, *Ecclesiæ ne conferantur*, &c. and ver. *Nisi personis ecclesiasticis*, saith; "Quòd persona ecclesiastica dicitur, non solum persona ordinata ad quæcunque alia ministerio ecclesiastico deputata. Unde *Conversi*, *Pœnitentes*, *Templarii*, et *Hospitalarii*, ministerio ecclesiastico deputati, dicuntur Personæ Ecclesiasticæ. Item quæcunque personæ regulares dicuntur Personæ Ecclesiasticæ. Cum itaque hujusmodi personarum ecclesiasticarum plures sint in statu laicali, et non clericali, quales sunt *Templarii* et *Hospitalarii*, et multi qui dicuntur *Conversi*, apparet, quòd talibus laicis ecclesiæ possunt tradi ad firmam. Et ubi simpliciter statuitur, ne laicus ecclesias teneat ad firmam, non distinguendo, utrum sit laicus professione et habitu, necne. Sed illud puto intelligendum de his, qui sunt merè laici tam habitu quam professione. Nam *Conversi*, et alii prædicti divino officio mancipati, licet non sint ordinati, tamen ratione professionis et habitus differunt ab aliis laicis. — Et regulariter, verum est, quod laici non possunt, nec debent tenere ecclesias ad firmam. — Clerico seculari deficiente, ob magnam necessitatem poterit episcopus dispensare, ut ecclesia committatur laico per viam firmæ ad tempus."

Lindwood in the same title, cap. "*Licet bonæ*," &c. ver. "*In suos usus*," "*Decimæ, et alia in ecclesiis obvenientia non sunt laicis concedenda, viz. ut oblationes vel decimas habeant per viam tituli, et jure suo. Secus tamen est, si in laicum transferatur mera facultas facti, scil. perceptionis fructuum per viam firmæ. Nam merum facti exercitium sine titulo bene cadit in laicum: potest enim laicus esse procurator in causis spiritualibus.*" And in the same chapter, "*Asserunt non ligari*," "*Beneficium tenetur ut proprietas, non autem ut beneficium, quando non obtinetur per institutionem canonicam, nec consideratur vacatio per mortem prælati; sed commoditas fructuum percipiendorum aliquibus conceditur per superiorem alio, utputa, vicario curam animarum inibi gesturo. Et beneficia tenent non ut beneficia, sed ut proprietatem, quorum cura exercetur per vicarium perpetuum constitutum in eisdem.*" And in the same chapter, "*Portiones*," "*Hæ portiones potuerunt pervenisse ad locum*"

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“*religiosum de concessione etiam laici, cum solius Diœcesani consensu de decimis vel procentibus quas laicus talis ab ecclesiâ aliâ habuit in feudum ab antiquo. Et hoc verum, si tales portiones decimarum eis donatæ fuerunt ante Concilium Lateranense, quod celebratum fuerit anno Domini 1180. tempore Alexandri tertii. Nam ante illud Concilium bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ vel monasterio dare, non tamen post tempus dicti Concilii.*”

In the same chapter, “*Appropriationum,*” “*Appropriatio locum habet in omni casu quo ecclesia tenetur ut proprietas, sive agatur de ipsius totalitate, sive de ejus parte. Et appropriatio in largo modo sumpta sonat in casum illum quo beneficium detur in usus proprios. Sed hic adverte, quod quandoque jura loquuntur de casu vel jure donationis ecclesiæ factæ loco religioso, vel alteri; quandoque de casu vel jure unionis sive annexionis factæ tali loco. Et in appropriationum literis solet superior uti his terminis, ‘Unimus, annectimus et incorporamus, et eam in proprios usus perpetuò obtinendam concedimus.’ quæ omnia et singula quandam diversitatem important, aliàs esset nugatio et inculcatio terminorum, quod reprobatur in jure. Et multiplex est unio. Fit enim unio ecclesiarum, quando una subjicitur alteri: et per talem unionem non præjudicatur diœcesano cui suberat, nisi fiat de ejus consensu; etiamsi confirmetur per Papam, nisi id in confirmatione exprimatur. Fit etiam unio ecclesiarum sic quod unus sit prælatus ambarum; et tunc utraque remanet in statu suo ut prius, exceptâ solâ prælaturâ. Fit etiam unio duarum ecclesiarum ad invicem, et tunc consuetudines et privilegia, quæ in alterâ earum habentur meliora et humaniora, tenenda sunt. Fit quoque unio ecclesiarum, cum conventualis in cathedralem eligitur, et idem est prælatus utriusque. Et hanc facit solus Papa.— Ecclesiæ parochialis ad religiosum locum propriè non fit unio, sed potius donatio. Nam unio propriè locum habet in rebus quæ sunt ejusdem naturæ, utputa, in duobus prioratibus, vel in duabus administrationibus vel obedientiis, in quibus religiosi subjectionem habent. Sed verum est, quòd ecclesiæ parochialis sæcularis, et cui solet deserviri per clericos sæculares, non est ejusdem naturæ cujus est ecclesiæ regularis; unde inter res propriè non cadit unio, licèt fructus talis ecclesiæ possint incorporari aliis fructibus ecclesiæ regularis, sic ut religiosi ipsos fructus percipiant in usus proprios, reservatâ congruâ sustentatione pro ministris in tali ecclesiâ deservituris.”*

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Lindw. tit. De Judiciis, (a) cap. “*Item omnes,*” ver. “*Personas ecclesiasticas,*” “*Personæ ecclesiasticæ sunt Clerici, in quocunque ordine constituti: præter quos etiam comprehenduntur sub his per-*

" *sonis ecclesiasticis Templarii, Hospitalarii, Conversi, et quilibet Religiosi.*"

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And so it appeareth by all these books of the canon law, that, until the council of *Lateran*, laymen were capable of tithes in point of pernancy; and infeodations might be made unto them, and, by consequence, appropriations: but, after the council of *Lateran*, those that were mere laymen were not capable of tithes in point of pernancy, although Monks, Templars, Hospitallers, and such other ecclesiastical persons were, as not being accounted *Laici* within the prohibition of that council. And this council being received in *England*, as it appeareth by *Lindwood*, 2 *Rep.* 44. 32 *H. 8. c.* 7. 2 *E. 4.* 15. and *Br. Jurisdiction* 95. it was part of the law of *England*.

Dav. 70 b. (a) Those canons which were received, accepted and used in any christian realm or commonwealth, by such acceptation and usage have obtained the force of laws in such particular realm or state, and are become part of the ecclesiastical laws of that nation. And therefore those that were embraced, allowed, and used in *England*, were made by such allowance and usage part of the ecclesiastical laws of *England*; and the interpretation, dispensation, and execution of those canons, so become part of the laws of *England*, belong only to the king of *England*, and his magistrates, within his dominions.

7 *H. 8. Croke (b)* 181, 182. 184. It appeareth that the decrees and canons made by the pope, which were not received here in *England*, do not any ways bind: but it is admitted, that if they were received here in *England*, they would bind, as part of the law of *England*.

26 *E. 3.* 55. 29 *E. 3.* 44. The constitution of pluralities is received as part of the law of *England*, and thereupon by the acceptance of a second benefice the first is void. 24 *E. 3.* 30. 4 *Rep.* [451] 75. 79.

29 *E. 3.* 44. The sheriff upon a writ of accompt returneth, *Clericus est beneficiatus, non habens laicum feodum*, and no capias might be granted against him, because it appeared that he had a benefice.

Bracton, c. 2. "*Leges Anglicanæ et consuetudines approbatæ consensu utentium, et sacramento regum confirmatæ mutari non poterunt, nec destrui sine communi consensu et consilio eorum omnium quorum consilio et consensu fuerunt promulgatæ: in melius tamen converti possunt, etiam sine eorum consensu, quia non destruitur quod in melius commutatur.*"

11 *H. 4.* 76. If the king doth grant unto a man, that he shall hold his land after such time as he is entered into religion and pro-

(a) *Davys' Reports.*

(b) See *supra*, 445. n.

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fessed, such grant is void ; for such a grant is against the common law of the land, and the heir upon the profession and entry into religion is to enter and inherit by the common law.

4 Rep. 95. *Bozoun's case*. Where the queen may not by the common law make the grant, there, a *non obstante* of the common law will not, against the reason of the common law, make the grant good ; and therefore, if the king will grant a protection in a *quare impedit*, or assise, with a *non obstante* of any law to the contrary, this grant is void ; for, by the common law, protection doth not lie in either of those cases for the loss that may happen to the plaintiff by such delay ; and therefore the *non obstante* may not help.

Comm. (a) 398, 399. *the Earl of Leicester's case*, and 29 E. 3. 25. do agree, that if one be attainted by parliament, the king of his own head may not reverse this award made there.

1 Mar. Dy. 94. The king may not annex or unite a manor to the duchy of *Cornwall* by his letters patent without authority of parliament, and make this parcel of his duchy, and to go after the form and course of the duchy. 8 Rep. 16. 17. *The Prince's case*.

7 Rep. 7. *Calvin's case*, 36 H. 6. The king by his letters patent may not make any inheritable, who is not inheritable by the common law of the land : and, therefore, he may not grant, that an *ante natus*, or other alien, shall take by descent from his father, being an alien.

5 Rep. 55. *Knight's case*. The king may not alter the law or custom of *England* by patent. 37 H. 8. Br. *Patents* 100.

49 E. 3. 4. The king may not make land devisable by his charter.

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9 Rep. 123. *Anthony Lowe's case*. The king by his charter may not alter the law ; *nam id rex potest, quod de jure potest*.

And it being so, that canons received here in *England* by the common assent of the king and his people, and not being contrary to the law of God, prerogative of the king, or statutes of the realm, are become the laws of this realm ; and it not being in the power of the king to alter and change the laws of this realm ; this charter of appropriation, which maketh laymen capable of tithes, contrary to the law received, and maketh them parsons imparsonnee of a spiritual benefice, cannot be good.

And whereas it may be objected, that it was only the council of *Lateran* that made laymen incapable of tithes and of an appropria-

(a) Plowden's Reports or Commentaries.

tion granted unto them; and so, upon the matter, it was only *malum prohibitum*, with which the king may dispense, as it appeareth by 2 Rep. 3. 12. 1 H. 7. 3. 11 H. 7. 12. 37 H. 6. 4. and many other authorities; I answer, that the appropriating of the rectory, which is *libera eleemosina ecclesiæ*, unto a lay corporation, the giving of laymen power to hold tithes *in proprios usus*, when they are *redditus ecclesiæ*, the making of laymen incumbents of a spiritual benefice, is *malum in se*, as it appeareth by Comm. 497. *Grendon's case*, where it is said by *Dyer*, that an appropriation made unto nuns was *grande nefus*, for they could not administer the sacraments, nor say divine service to the parishioners; and this, which was under pretence of hospitality, was the ruin of hospitality. And it being *malum in se*, the king by his letters patent may not dispense with it by any *non obstante* that he can make.

19 H. 6. 63. The king granteth unto one, that he shall not afterwards be punished in felony or trespass; such grant is void; for it is against common right and justice, and may not stand with the law.

11 H. 7. 12. The king may not dispense with one to kill another, inasmuch as it is *malum in se*, and prohibited by the law of nature. So, to make a nuisance in the highway.

Dav. 75. The king may not grant, that if a man do a trespass unto me, I shall not have an action against him.

And whereas it may be objected, that there are many precedents of appropriations unto lay corporations, colleges, hospitals, &c. and a great inconvenience may ensue, if such appropriations shall be adjudged to be void; I answer, 1st. *summa ratio, quæ pro religione facit*; and the multitude of precedents, as it appeareth by *Magdalen College case*, 11 Rep. 78. are not to bear any way; for as it is said there of the possessions of the college, so it may of this rectory; that this rectory which was given for the maintenance of religion, and feeding of the souls of the parishioners, should be converted to a private use; *scique* (as the statute of *Carlisle*, 31 E. 1. speaks) *quod olim in usus pios ad divini cultûs augmentum et cætera opera pietatis charitatisve fuit erogatum, nunc in sensum reprobum est conversum*. And 4 Rep. 33. *Mitton's case*, and 94. *Slade's case*, will tell you further of the fruit of precedents.

2dly. All such appropriations as are composed of ecclesiastical persons, although no part of the priesthood, are out of the council of *Lateran*, and so no ways prohibited by the law, and therefore such appropriations are good enough.

11 Rep. 76. *Magdalen College case*. The college is said to be temporal, where it is for the advancement of liberal arts and sciences, or to educate young men in good literature; ecclesiastical, where it

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3dly. I answer, *distinguenda sunt tempora*: for before the decree of the council of *Lateran*, which was made, 25 *H.* 2. and prohibited the giving of tithes unto laymen, appropriations might be made unto lay corporations: and the precedents of appropriations unto lay corporations may be of appropriations made before that time; and those are not to be resembled unto our case, where the appropriation was made 1 *E.* 6.

Comm. 496, 497. It is resolved, that none is capable of an appropriation but a body corporate or politick spiritual, that hath succession: for the effect of an appropriation, at the first institution of it, was, to make any body incumbent perpetual, and as incumbent perpetual to have the rectory; and the houses, and glebe, and tithes, as parcel of it: and in this that he is made parson, he hath cure of souls of the parishioners, in which case he ought to be a person spiritual. And as a person ought to present unto a church a person spiritual, and not a person temporal; so, and by the same reason, an appropriation ought to be unto a person spiritual, and not temporal; for the one hath cure of souls as well as the other; and they do not differ but in this, that the one is parson for his life, and the other and his successors are parsons for ever.

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5 *Rep.* 10 *Caudry's case*, 7 *E.* 3. *Quare impedit* 19. No man can make any appropriation of any church having cure of souls, being a thing ecclesiastical, and to be made to some person ecclesiastical, but he that hath ecclesiastical jurisdiction.

11 *Rep.* 70. 72. *Magdalen College case*. The king who is *persona mixta, medicus regni, pater patriæ, et sponsus regni*, who by the ring is espoused unto the realm at his coronation, shall not be enabled to make an appropriation unto a lay corporation, which would be a means of dilapidations, decay of spiritual living and of hospitality, and, by consequence, a decay of religion and justice; and therefore it is true, *quod summa ratio est, quæ pro religione facit*: and as the statute of *Westm.* 2. *cap. ult.* saith, *Summa charitas est facere justitiam singulis, et omni tempore quando necesse fuerit*. And the king being the fountain of justice and common right, and God's lieutenant, may not do wrong unto the church in taking that from the church which was dedicated to the same. *Et solum rex hac non potest facere, quod non potest injustè agere.*

Inst. 341. *Bract. Lib.* 4. c. 226. *Causa ecclesiæ publicis causis æquiparantur: et ecclesia fingitur vice minoris; meliorem potest facere conditionem suam, deteriolem nequaquam.* 1691.

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And it is to be observed, that if an appropriation may be made unto a lay corporation, the jurisdiction of the ordinary who hath power of visitation and of certifying profession, is taken away; the which is against reason, unless it be with his own consent. 8 *Ass. pl.* 29. 10 *Eliz. Dy.* 270. 44 *Ass. pl.* 7. 9 *H.* 7. 2.

And the law hath a special care, that he who is married unto the church, be not proved a miscreant, a schismatick, an irreligious person, a person illiterate, a layman, a bastard, or a villein, as it appeareth by 5 *Rep.* 57. *Specot's case*, 38 *E.* 3. 2. 5 *H.* 7. 20. 15 *H.* 7. 8. 14 *H.* 7. 25. 12 and 13 *Eliz. Dy.* 293. 11 *H.* 7. 12. 11 *H.* 4. 8. and many other books; by which it appeareth, that he may be refused by the ordinary; or, if not refused, he may be deprived for these causes after such time as he hath gotten into the church.

And by the same reason that the law is careful who shall be incumbent, where he is to be only incumbent for his life; it will also be careful where a corporation is to be an incumbent perpetual.

And whereas it may be objected, that this appropriation in the case at the bar, was for good and spiritual uses; it appearing by the king's charter that it was *ad divini cultus augmentationem, ad bonorum, catallorum et hæreditamentorum ecclesiæ parochialis de Crediton meliorem sustentationem, et ad puerorum eruditionem*; and that hospitality, which was the first cause of the institution of impropriations, may as well be maintained here, as in the case of other appropriations, and that there may be a vicar to serve the cure, and to administer the sacrament as well as in other appropriations; I answer, that the good uses and good end may not make an appropriation good, where the hand, that is to take it, cannot take it, and the body, unto whom it is made, is by the law disabled to receive it: for, if an appropriation be made unto a monk, that is a dead person in law, or to a layman; for all those uses, it cannot be good, by reason of the disability which the law putteth upon a monk or layman to receive it.

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11 *R.* 2. *pat.* 2. No. 38. *Rot. patentum.* The writ directed unto the sheriffs of London reciteth, "*Cum ecclesia Sancti Dunstani West parochialis in suburbio London, et ipsius ecclesiæ fructus et proventus per dominum Henricum quondam regem Angliæ adtunc patronum inter cætera piè assignati fuissent ad sustentationem illorum qui a Judaicâ pravitæ ad fidem Catholicam in regno Angliæ tunc conversi fuerunt, et aliorum qui se converterent; quibus quidem conversis et convertendis idem progenitor infra parochiam ecclesiæ prædictæ certum locum ad inhabitandum ordinavit, et capellam in*

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“honorem beatæ Mariæ Virginis construi fecit: necnon pro sustentatione capellanorum et clericorum in dictâ capellâ deserviturorum, voluit certum custodem per ipsum et hæredes suos dictis conversis assignari; ad ea quæ eis et capellanis et clericis prædictis pro sustentatione suâ assignata fuerunt, et assignarentur, sibi liberanda: ac venerabilis pater R. quondam episcopus London, civitatem et diocesim London visitando, invenit quòd cura dictæ ecclesiæ parochialis penes custodem dictorum conversorum aut alium juxta canonicas sanctiones, prout debuit, non remansit; et volens statui ecclesiæ illius et saluti animarum juxta officii sui debitum providere, et devotionem sinceram dicti progenitoris nostri el domini Edwardi quondam regis Angliæ progenitoris nostri, de assensu ipsius Edwardi, ordinasset *, quòd extunc dictus dominus Edwardus et hæredes sui idoneam personam ad dictam ecclesiam eidem episcopo et successoribus suis præsentarent canonicè rectorem instituend' in eadem, qui omnes fructus et obventiones dictæ ecclesiæ integrè perciperet, et omnia onera ordinaria et extraordinaria dictam ecclesiam qualitercunque contingentia subiret, et præter hoc conversis prædictis dum vixerint in subventionem sustentationis eorum seu capellanorum et clericorum in prædictâ capellâ beatæ Mariæ deserviturorum quatuor libras ad dictum custodem, qui pro tempore fuerit, aut ejus locum tenentem ministrand' singulis annis solveret.” And this which was for the payment of the arrearages of 4*l.* by the year by *John Brampton* parson of the said church, unto *John de Burton* warden of the said house. And observe out of this case, that there was a presentation made by the king unto the church, and a disappropriation made, which could not have been, if the appropriation had been good. For, as it appeareth by *F. N. B. 35. F. Comm. 500. Grendon's case, 38 H. 6. 19 & 20. 39 H. 6. 20.* a presentation made by an estranger unto an advowson which is appropriate unto an abbey, be the presentation made in time of vacation, or in the time of the abbot, will be void, howbeit that he be instituted and inducted, insomuch that the church may not be void, but is always full, and a presentation, when the church is full, is void; but, if the abbot himself had presented his clerk unto the bishop, this presentation had disappropriated the advowson for ever, and had made it presentable afterwards, according unto *F. N. B. 35. F. Comm. 501. 22 H. 6. 28. and 11 H. 6. 19.*

The reasons then why this appropriation unto a lay corporation will not be good, are,

1st. In regard that he unto whom the appropriation is to be made, is to be a perpetual incumbent of the church appropriated,

* This ordinance, which was made by *Richard Newport*, bishop of *London*, in 1317, is to be met with in the *Bandate Register*, p. 37. in the registry of the diocese of *London*.

and parson imparsoned of that church; and therefore, the corporation unto whom the appropriation is made, must be of such quality as is proper to be incumbent of a church, of which nature ecclesiastical corporations are, and not a lay corporation.

19 *H. 3. Juris utrum* 16. 19 *E. 3. Quare impedit* 19. 22 *E. 3. 2. & 12. 33 E. 3. Ayd de roy.* 103. 45 *E. 3. Darren presentement* 8. 11 *H. 4. 68. 12 H. 4. 21. F. N. B. 38 L. 26 H. 6. Brief al Evesque* 6. 38 *H. 6. 19. & 20. 21 H. 7. 1, 2, 3, & 4. 6 H. 8. Croke* 169. 27 *H. 8. 5.* By all these books it appeareth, that the corporation unto whom the appropriation is made must name himself parson in an action brought, and he must likewise be named parson.

5 *Rep. 57. Specot's case* 58. 38 *E. 3. 2. 5 H. 7. 20. 15 H. 7. 7 & 8. 14 H. 7. 25. 12 & 13 Eliz. Dy.* 293. 11 *H. 7. 12. and 11 H. 4. 8.* describe the qualities of an incumbent.

2dly. In regard that the thing, whereof the appropriation is made, is a rectory, that consisteth of glebe and tithes *ac beneficium ecclesiasticum*, it is *libera elemosina ecclesiæ, non laicum feodum; sanctuarium Domini*, that is, consecrated unto the church; and therefore it may not be conferred or appropriated but unto those that are churchmen or ecclesiastical persons. *F. N. B. 49 N. Register 33. Seld. 128. 123. Lindw. 115. 116. 11 Rep. 75. Magdalen College case. 29 E. 3. 44. 1 Inst. 341.*

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3dly. In regard that this corporation, unto which the appropriation is made, is a corporation consisting of mere lay persons, and no manner of ecclesiastical persons amongst them, and so in law is a lay corporation, and not either a mixt corporation (where *magis dignum* may *trahere ad se minus dignum*,) nor an ecclesiastical corporation; and such lay corporation by the canons of the church made long since by *Alexander* the third in 25 *H. 2.* and received here in *England*, and so made part of the law of *England*, are disabled to take tithes to their proper use, and, by consequence, to have an appropriation made unto them. And they being disabled by the law, the king by his letters patent may not enable them; for this were to change the settled law of the kingdom of *England*, the which the king by his charter may not do.

Seld. 112. 114. 177. 128. Lindw. 113. 117. 32 H. 8. c. 7. 2 E. 4. 15. 2 Rep. 44. Bishop of Winchester's case. 25 H. 8. Br. Jurisdiction 95. It appeareth from these books, that laymen are incapable of tithes by the ecclesiastical laws received here in *England*.

Dav. 70. 25 H. 8. c. 21. 7 H. 8. Croke 181, 182. 184. 26 E. 3. 55. 24 E. 3. 30. 29 E. 3. 44. 4 Rep. 75. 79. It appeareth from these, that if the canons of the church be received here in *England*, they are become part of the law of *England*.

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1631. *Bract. c. 2. 11 H. 4. 76. 4 Rep. 35. Bozon's case. 1 Mar. Dy. 94. 7 Rep. 16, 17. 5 Rep. 55. Knight's case. 9 Rep. 123. Anthony Lowe's case. 49 E. 3. 4. 19 H. 6. 79.* It appeareth by these, that the king by charter cannot alter the law of the kingdom.

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11 H. 4. 76. *Comm. 399. Leicester and Heydon's case. 29 E. 3. 29. 7 Rep. 7. Calvin's case.* It appeareth that the king cannot enable one by his charter to take, who standeth disabled by the law.

19 H. 6. 63. 11 H. 7. 12. *Dav. 75.* show, that the king may not by his charter dispense with *malum in se*.

4thly. In regard that there are divers resolutions in the very case in question. *Comm. 497. Grendon's case. 11 R. 2. pat. 2. No. 38. 5 Rep. 10. Cawdry's case. 7 E. 3. Quare impedit 19. 11 Rep. 70. Magdalen College case.*

[458] 5thly. The objections that have been made of the other side are not of any validity, and may easily receive an answer.

As to the second point, which is, whether the appropriation be destroyed for want of an endowment of a vicar, it will rest upon many points. The first of which will be, whether it be of necessity that a vicar be endowed, otherwise the appropriation to be void. The second will be, whether here be a sufficient endowment of a vicar, and an endowment in due time, whereby to continue the appropriation, admitting that an endowment were necessary.

Lindw. "De locato et conducto," (a) cap. "Licet bona," ver. "Asserunt non ligati." "Non video quod per concessionem vel appropriationem ecclesiæ factam loco religioso sub aliquo modorum, de quibus præfertur, desinat ipsa ecclesia esse beneficium ecclesiasticum; immo semper remanet in statu suo, saltem quoad divina ibi celebranda, sacramenta et sacramentalia ministranda, et numerum ministrorum, qui diminui non debet: licet fructus talis beneficii qui remanent ultra necessaria ad sustentationem hujusmodi ministrorum et onera eis incumbenda, in certis casibus possent in usus proprios converti ipsorum Religiosorum. — Et sic monasterium hujusmodi potest bona ecclesiæ taliter donatæ vertere in usus proprios, reservatâ tamen congruâ sustentatione secundum morem antiquum ecclesiæ, ut, videlicet, nullus minister in ecclesiâ ab antiquo positus et visitatus diminuatur, sed numerus ministrorum in statu antiquo conservetur: et si aliquid ultra eorum congruam sustentationem supersit, illud cedat in proprios usus ipsorum Religiosorum."

Lindw. "De officio vicarii," (b) cap. "Quoniam," ver. "Assignetur," upon the rubrick, which is, "*Vicario nisi valde tenues sint*

(a) Ch. 3. fo. 81.

(b) Ch. 1. fo. 34.

"*ecclesiæ conditiones non minor quam quinque marcarum assignetur quotannis redditus. Animadvertat autem proprius episcopus, uter principalis an vicarius onera ecclesiæ subeat;*" saith, "*Assignetur tempore ordinationis ipsius vicariæ, vel saltem antequam vicarius in ipsâ ecclesiâ institatur. Et si præsentatus sit dignus, episcopus ante assignationem debet eum admittere; et potest, elapso tempore congruo per eum patrono ecclesiæ præfigendo, portionem sufficientem assignare, si patronus ipsam assignare distulerit vel neglexerit.*"

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And in the same chapter, ver. "*Sunt contenti,*" "*Episcopus nullum admittat in vicarium ad præsentationem Religiosorum, nisi tantum sibi assignetur de proventibus ecclesiæ, unde jura episcopalia possit persolvere, et congruam sustentationem habere.*" And yet it is there concluded, "*quod præsentantes prius possunt præsentare, et postea portionem assignare, vel e contra: sic Diæcesanus primò potest admittere, et postea assignare portionem, vel e contra.*"

Seld. 370, 371. "The most common intent, allowed by canonical confirmation, was, that the corporation whereto the appropriation was made, should put clerks or vicars into the churches so conveyed to them, who were to answer to them for all temporal profits, as tithes, and other revenues: and to the ordinary for spiritual function." And Selden voucheth a confirmation made by the archbishop of York unto the priory of *Durham*, 17 Will. 1. "*Ut omnes ecclesias suas in manu suâ teneant, et quietè eas possideant, et vicarius suos in eis liberè ponant, qui mihi et successoribus meis de curâ tantum intendant animarum, ipsis vero de cæteris omnibus eleemosinis et beneficiis.* So, under Henry the second, pope *Lucius* the third writes to all the monks in the province of *Canterbury*, and bids them, that in all churches, *in quibus præsentationem habetis, cum vacuerint, Diæcesanis episcopis clericos idoneos præsentetis, qui illis de spiritualibus, vobis de temporalibus debeant respondere.* And there it is said, that the vicars, incumbents, or presentees had no more of the profits (notwithstanding the institution) than the monasteries would arbitrarily allow them. Nor was there any perpetual certainty of profits or revenues to their presentees, until such time as the monks, by composition with the ordinaries, or by their own ordinance, appointed some yearly salaries in tithes, glebe, or rent, severally for the perpetual maintenance of the cure; which salaries became afterwards perpetual vicarages."

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Syntagma Juris(a), fo. 282, 283. "*Vicarius perpetuus et clerus quo-*

(a) What *Syntagma Juris* this is I know not. I should presume it to be *Struvius's Syntagma Juris Publici*, a book which I have not been able to meet with, and therefore I am not certain that I read the extract correctly. I have examined *Struvius's Syntagma Jurisprudentiæ*, and

his *Syntagma Juris Feudalis*, but find not the passage in either of those books. (I have not discovered the source from which this extract is taken, but I have ventured to correct the text where the grammar appeared to be false. Ed.)

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que est is qui animarum curam habet. Accrevit autem origo curæ ejus generis a tempore quo qui beneficium possidebant habens animarum curam, quod assiduitatem seu residentiam exigit, cæperunt excusare ne assiduitatem in loco beneficii redderent ob majorem dignitatem advenientem, vel quod fructus capitulo alicui vel collegio assignati fuerint, vel aliam ob causam. Et proinde constitui cæpit vicarius, isque perpetuus, cum aliquâ fructuum beneficii portione, qui regeret actu populum in ecclesiâ præpositus ex constitutione ejus qui alios fructus perciperet, approbante et constituente episcopo. Et sic vicaria perpetua beneficium dicitur. Vicaria perpetua unum esse videtur beneficium cum priora, cui annectetur, sive sit prioratus regularis, sive secularis: idem enim ejus species esse possunt. Proinde ex eo beneficio æquum est vicarium perpetuum idoneam, et sufficientem et congruam portionem capere; si quidem episcopus consentire non debet unioni ecclesiarum, priusquam congrua portio earum presbyteris reservetur, nec præsentatum a prioribus admittere, nisi is habeat unde commodè vivere possit et jura episcopulia solvere. Potest tamen et episcopus præsentatum admittere primò si velit, et postea præsentato idoneam et sufficientem et congruam ex fructibus beneficii pensionem assignare. Congrua portio seu pensio vicarii consideratur aliquando habitâ ratione oneris impositi eidem vicario; interdum ex constitutione modicæ pensionis; interdum ex pactione, quando priores vel illi qui præsentant vicarios cum illis paciscuntur, ut illi pensionem prioribus solvant, et reliquos fructus suos capiant."

See also the statutes of 15 R. 2. c. 6. *supra* 10. and 4 H. 4. c. 12. *supra* 13. (a)

Hil. 5. E. 2. Quare impedit 165. A vicarage is a thing spiritual; and may not be made without the assent of the patron and parson; and howbeit that a portion be admeasured from the parsonage, this may not be done without the assent of the patron and parson. And the estate of the patron is not changed by the admeasurement of this portion for cure of souls: and with this agreeth 16 E. 3. *Monstrans de faits* 166.

40 E. 3. 28. It is agreed, that it lieth in the power of the ordinary with the assent of the patron and parson to endow the vicar, and to increase and diminish the endowment, as there shall be occasion. But, whether the freehold after such endowment, be in the parson or in the vicar, there is some doubt; it being agreed; that anciently the vicar could not maintain any action, insomuch that the freehold was in the parson. But at this day the law is conceived to the contrary. And it may fall upon this difference, where the endowment is by the parson himself, who maketh an

(a) These statutes are set out at length in the manuscript.

actual livery; and where it is made by the ordinary, who hath no power to make a livery.

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11 H. 6. 32. A vicarage is a derivative out of the parsonage.

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Constitutiones Othobon f. 19. (a) "*Ad sufficientiam beneficii et vicarii carii requiritur, quod ultra habeat de quanto potest jura episcopalia solvere, et cetera incumbencia onera supportare.*"

10 Rep. 42. *Portington's case*. — These words, *ad effectum, et intentione, ad solvendum*, or such like, do not make a condition in feoffments or grants, unless it be in the case of the king. [461]

1 Inst. 204. If a man make a feoffment in fee *ad faciendum*, or *faciendo, et intentione*, or *ad effectum*, or *propositum*, that the feoffee shall do, or not do, such an act; none of these words make the estate in the land conditional; for in judgement of law they are no words of condition in the case of a common person. But in the case of the king, the said, or the like, words do create a condition. And so it is in the case of a will of a common person.

38 H. 6. 34, 35, 36, 37. The king granted unto the duke of *Bedford*, and others, certain possessions parcel of an abbey in *France*, *ad effectum* that they should grant them to certain women when they were founded and established by the king or others; and holden, that these words "*ad effectum*" in the case of the king do make a condition, and give the king a title of entry. And with this agreeth *Leicester and Heydon's case*, *Comm.* 399. (b)

M. 16 Ja. In the *King's Bench*, *Treswallen and Penhule's case*. 2 Ro. Rep. 66. S. C. Upon a special verdict the case appeared to be such: The king being seised of the manor of *Dorset*, and other lands in the county of *Cornwall*, 3 H. 7. granteth them unto Sir *Thomas Lovell* and his heirs, *et intentione*, and upon trust and confidence (not comprized in the patent, but found in the verdict) that Sir *Thos. Lovell* should grant a rent of 50 marks by the year unto one *Nicholas Cromer* and the heirs male of his body, the remainder unto the king and his heirs; and after the grant of the rent, to convey the said manor and lands unto Sir *Richard Edgecumbe* and his heirs males, the remainder unto the king and his heirs. And there, in respect that the words "*et intentione*," and "*trust*" were not mentioned in the letters patent, it was adjudged to be no condition.

P. 16 Ja. *Brett and Cumberland's case*, in this court. The queen 26 Eliz. by her letters patent duly made a lease for 31 years, wherein are these words: "*And the said William Cumberland, his executors and assigns, shall sustain, maintain, and repair the said mills in good reparation, and shall leave them well maintained and repaired at the end of the term:*" and adjudged that these words

Cro. Ja.
309. 521.
1 Ro. Rep.
359. 2 Ro.
Rep. 63.
Poph. 136.
3 Bulstr.
163. Godb.
276. S. C.

(a) I do not find this passage any where in *Othobon's constitutions*.

(b) *Flowden's Reports or Commentaries*.

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in the letters patent of the king would be a good covenant, notwithstanding that it was not the deed of the party; for the word "shall" is a word of compulsion; and the patentee, having accepted the lease, is bound unto the agreement specified in the patent.

13 *H. 7. 22. Litt.* § 378. Upon the grant of the office of a parkership, there is a condition in law *tacitè* annexed to it, that the parker shall exercise the office.

8 *Rep.* 44. *Whittingham's case*. Conditions in law are of two sorts, by the common law, and by statute law. And conditions in law by the common law are of two sorts, that is to say, grounded upon a confidence and skill, and without a confidence and skill. Conditions in law by statute law are also of two qualities, namely, when the statute for the execution of a condition in law gives a recovery, and when the statute gives an entry and no recovery.

7 *Rep.* 34. *Nevil's case*. Upon the creation of an earl to one and the heirs male of his body, there is a condition in law annexed, that he doth not commit treason.

38 *Ass. pl.* 3. *Litt.* § 383. 26 *Ass. pl.* 39. A man deviseth his lands to his executors to be sold, and dieth: the executors enter and take the profits, and being offered money, but not to the value, refuse to sell them, but continue the possession, and take the profits to their own use: the heirs of the devisor may enter by force of a condition in law annexed to the estate of the executors, namely, that they ought to sell so soon as they may; and that they ought to take the profits unto the use of the testator, in both of which they have failed.

Supra 158.

11 *Rep.* 13. *Priddle and Napier's case*, the case of *Grimes and Smith, Tr.* 30 *Eliz.* in the *Exchequer Chamber*. The parsonage of *Lubbenham* in the county of *Leicester*, 22 *E. 4.* was appropriated unto the abbot of *Sulby*, and no vicar endowed there according to the purview of the acts of 4 *H. 4. c.* 12. and 15 *R. 2. c.* 6. But a vicar had in reputation continued, and the rectory, as appropriate continued also: and it was resolved, that the rectory was given unto the king by the statute of monasteries.

Supra 221.

Hil. 44 *Eliz.* the case of *Robinson*, the vicar of *Kimbolton*, and *Bedell*. A rectory was impropriate in the time of king *E. 3.* and a vicar endowed, but no presentation of a vicar by 160 years; and the queen presented by lapse; and her presentation holden good; for the vicarage shall not be intended to be reunited, except some such matter may be shewn, or some presumption of it, for the smallness of the rectory.

Words of
the charter
in the pre-
sent case.

" *Et ulterius volumus et ordinamus per præsentés quod prædicti*
" *duodecim gubernatores et successores sui super appropriatione dictæ*
" *ecclesiæ et rectoriæ de Exminster vicarium ejusdem ecclesiæ et suc-*
" *cessores suos dotentur cum unâ domo conveniēti pro mansione sua, et*

"congruâ convenienti, et rationabili portione sive pensione pro victu
 "et sustentatione ejusdem vicarii et successorum suorum, et pro omni-
 "bus aliis oneribus et sumptibus eidem vicario incumbent' supportand'
 "et manutenend' viz. pro annuali portione sive pensione 12l. per ann.
 "Volumus, quod dicti duodecim gubernatores providerint, seu provi-
 "deri facient, vicario ecclesiæ de Exminster prædict' unam domum sive
 "mansionem honestam et competentem, quæ quidem domus sive mansio
 "ad eundem vicarium et successores suos in perpetuum pertinebit ad
 "inhabitand'."

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And it is to be observed, that 2 Apr. 1 E. 6. the charter of appropriation was made; 3 Oct. 1583, which was 26 of Eliz. the governors, upon the death of William Leveston, who died the last day of September preceding, presented one Wm. Randall to be the vicar who was admitted, instituted, and inducted. He had a house assigned unto him, and 12l. by the year paid unto him, but no legal endowment until 1 June, 4 Car. and before that time, namely, 13 July, 23 Ja. the king had presented Valentine Davy, bishop of Exeter, by lapse; so as the endowment was not in a convenient time, and, by consequence, the appropriation by virtue of the condition in law, which the law, and the statutes, and the charter of the king annexed unto the same, was dissolved, and a disappropriation made by the king's presentation.

Ball, Noy, Littleton, and Henden, for the defendant.—They observed, 1st. that notwithstanding the appropriation was to a lay corporation, yet it was to spiritual and good uses: for the end of it (*et res denominatur a fine*) appears in the king's charter to be *ad divini cultûs augmentationem, ad educationem puerorum, ad sustentationem pauperum*: and the end of this corporation being for spiritual and good uses, it may be well said to be such a corporation to which an appropriation may be made.

In the Book of Entries, 532. 533. and 33 E. 3. *Ayde de roy* 103. it appears, that an appropriation may be made to a dean.

2 H. 4. 10. The Abbey of Saltash (a) was appropriated to Windsor college. And 6 H. 7. 12. 11 H. 7. 8. & 27. an appropriation was made to a college.

3 E. 3. 11. An appropriation was made to the Hospitallers and Templars, and they are still Knights of Rhodes, who are *in ordine militari et in statu laicali*, and not *in statu clericali*.

33 H. 3. Rot. patent. membr. 1. The church of Hereford* was appropriated to the hospital of St. Anthony, and that for the benefit of the poor. [464]

* Qu. if
 not Here-
 ford. (b)

(a) This is stated in the Year Book to be the abbey of Saltash in the county of Devon: but quære, whether it ought not rather to be the rectory of Saltash in Cornwall, which now belongs to Windsor college?

(b) From Duncomb's History of Hereford, vol. i p. 592. it appears that it is properly read "Hereford." Ed.

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14 *E. 2. Rot. patent. par. 2. membr. 19.* It appears, that an *ad quod damnum* was awarded to inquire what damage it would be to the king for the bishop and dean of the church of *Sarum custodi puerorum, &c.*

14 *E. 2. Rot. patent. par. 2. membr. 1.* A licence to the chancellor and university of *Oxford* to purchase advowsons of the value of 40*l.* to them and their successors, *ita quod, &c.*

16 *E. 2. Rot. patent. par. 2. membr. 24.* An appropriation to *St. Leonard's* hospital; with which agrees 3 *H. 5.*

5 *E. 3. Rot. patent. membr. 5. 11 R. 2.* It appears, that the church of *St. Dunstan* was appropriated to a college for the support of the converted jews, though it was afterwards disappropriated with the consent of all parties, and a pension assigned out of the church for their maintenance.

22 *R. 2. par. 2. membr. 3.* An appropriation was made to the hospital of *Spital.*

Supra 136.

Comm. 496. 497. Grendon's case. It appears, that appropriations might well be made to monks and nuns; and yet monks might be laymen; and nuns could not have cure of souls, nor administer either *sacramenta* or *sacramentalia*; but, because the corporation was founded for a spiritual use and purpose, and the cure of souls might be supplied by the vicar, such appropriations were allowed as good in law.

49 *E. 3. among the placita cancellariæ in the petty bag,* it appears, that there was an appropriation to the master of the hospital of the Holy Ghost.

18 *E. 1. placita parliamentaria, fo. 14.* there is an appropriation *basilicæ princip. Apolorum de urbe Lincoln.*

13 *E. 1. membr. 103.* The bishop of *Ely* founded an hospital, and a church was given to it.

19 *E. 1. membr. 25.* The archbishop of *Canterbury*, with the assent of the pope and the king, appropriated a church to the house of ; with which agree 14 *R. 2. membr. 2. par. 1. and 40 E. 2. membr. 43.*

4 *E. 3. membr. 2.* It appears, that appropriations were made to colleges; and at this day several appropriations are enjoyed by *Oriel* college and *Merton* college in *Oxford*, and *Trinity* college in *Cambridge*; and yet colleges are lay corporations. And a great inconvenience would ensue, if the validity of such appropriations were to be questioned.

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2dly. It is agreed on all hands, that an appropriation may be made to a spiritual corporation. By the same reason then, that it may be made to a spiritual corporation, it may be made to a temporal and lay corporation. For the difference between a spiritual and a lay corporation is solely in this, that in the former the natural

bodies that constitute the corporation are spiritual persons, whereas the natural bodies that constitute the latter are lay persons. But in both cases the corporations of themselves are merely things in imagination, and the form of a body is equally given by the policy of men; and they are in both cases invisible; so that they cannot have the cure of souls, nor administer either *sacramenta* or *sacramentalia*. There is not, therefore, any greater inconvenience or absurdity in making an appropriation to a lay corporation, than there is in making one to a spiritual corporation: for the corporations, *qua* corporations, are equally and in both cases capable, where the appropriation is made to a good purpose.

50 E. 3. 26. 9 Eliz. Dy. 267. There is an appropriation to the chancellor or treasurer of the church.

4 H. 4. c. 12. There is an express appropriation of the church of *Haddenham*, to the archdeacon of *Ely*; and an archdeacon is lay, and *oculus episcopi*.

18 H. 7. *Croke* 48. 21 H. 7. 1. 44 E. 3. 33, 34. There was an appropriation to priors aliens.

3dly. There may as well be an appropriation to a lay, as to a spiritual corporation, if the end of the institution of appropriations be considered. For the cause of instituting appropriations being for the maintenance of hospitality, the relief of the poor, and other charitable purposes, a lay corporation is as capable of these as a spiritual one.

Churchwardens in *London* hold, as a corporation, the tithes of several appropriations. Among the *Originalia in the Exchequer in the Treasurer's Remembrancer's Office*, 28 H. 8. p. 1. Rot. 64. 4. we find appropriations to the commonalty of *Lincoln* for the poor and hospitality; and they actually hold them at this day; for in 29 Eliz. this came in question, and adjudged good.

A lay person may be a prebendary, who is a spiritual corporation. And of late time a layman, one *Pawson*, was dean of *Durham*.

15 R. 2. Rot. Parl. No. 38. and 4 H. 4. Rot. Parl. No. 52. [466]
prove that there must be a vicar endowed where there is an appropriation; and such vicar will supply the cure of souls, and administer both *sacramenta* and *sacramentalia*, where the appropriation is to a lay corporation, as well as where it is to a spiritual one.

Littleton saith, that it was not of necessity that a monk professed should be in orders, for it was only by accident, and for one in orders to be a monk, a dispensation was requisite. 26 H. 6. *Non-habilite* 13. 2 H. 4. 7. and 3 H. 6. 23.

As to the objection, that notwithstanding an impropriation, the parsonage continues, and the nature of tithes remains the same,

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and therefore such persons must have appropriations made to them, as may be parsons and are capable of tithes; it appears by 12 *E.* 4. 13. 19 *H.* 6. 21. 46 *Ass. p.* 4. and 18 *H.* 7. *Croke* 48. that, by the appropriation, the patronage is extinct; and spiritual corporations cannot be parsons any more than lay corporations; and therefore there is no difference as to that. *F. N. B.* 49. 98 *H.* 6. 31. 6 *H.* 8. *Croke* 169. 49 *H.* 6. 16. 4 *Rep.* 65. *Reg.* 35. 11 *H.* 4. 47.

Tithes are not spiritual things in their nature, but are only so in consideration of the uses to which they are applied, and here they are applied to spiritual uses. Although the commentators hold, that tithes are due *jure divino*, yet they say, that the tenth part is due *jure ecclesiastico vel positivo*. *Eurenius*, lib. 2. c. 2. *de beneficiis*. *Lindw. de decimis*.

8 *E.* 4. 13. *N. B.* 41. 43. A layman might for a certain time have tithes, by grant from a parson for years or life, by sequestration or composition.

38 *E.* 3. 6. 17 *E.* 3. 51. A layman might prescribe to have all the tithes, as by transaction, when there was a controversy, and so much was agreed to be paid, and no more.

The parson in former times had not all the tithes; but they were divided into four parts, whereof one was given to the parson for his labour; another to the bishop for hospitality; the third was for the repair of the fabric; and the fourth was for a provision for the poor: and all these concur in the present case.

Noy.

Modus decimandi is as much spiritual, as tithes are. *M.* 25 *H.* 3. *Rot.* 5. *B. R.* *Foliall's* case is the first prohibition I have ever met with granted upon a *modus decimandi*.

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As to the objection, that the appropriation is not good, because made without the ordinary; it may be answered, that to this appropriation there was all the concurrence that the law requires. For the king is patron; and the king is supreme ordinary; and as the pope could appropriate in former times without the consent of the inferior ordinary; so may the king at this time; he having now all the power which the pope then had.

N. B. 40. 21 *H.* 7. 1. The king by the common law is capable of tithes in pernancy, because *persona mixta*.

Ayde de roy 103. Because *sacro oleo unctus*, he is capable of spiritual jurisdiction.

Doctor and Student c. 36. He hath the supreme intendancy and cure of all the souls in his realm, and may transfer those cures to others.

7 *E.* 3. *Quare impedit* 19. The king with the patron might appropriate at common law without the ordinary.

14 *H.* 4. 10. The king can make a person who is dead in law,

as a monk, capable of suing and being sued ; and also of having tithes : *a fortiori* then, he may do so to persons, who are legally in existence, as in the present case.

All the power which the pope had is now vested in the king : and the pope granted to the Cistercians, &c. to be discharged of tithes ; and good. So, he used to grant tithes to laymen : at this day, the king of *Spain* holds the third part of the tithes of his kingdom by the pope's licence.

The king may erect new churches, and endow them ; as many are since 25 *H. 8.* out of the revenues of the monasteries.

It is objected, that this appropriation ought not to be allowed, because it is now the labour of parliament to restore all appropriations to spiritual hands. To that it may be answered, that the mischief in this case is not very great. Nor is it clear that the parliament can do this : it cannot do all things it would wish to do. I am moreover of opinion, that no appropriation can be made since the statutes of 13 of *Eliz. c. 10. & 20.* For there can be now no alienation of a benefice with cure of souls, and all grants made by the parson himself are void. I think also, that if the patron were to appropriate in the time of a vacancy with the consent of the ordinary, it would be void, and within the above-mentioned statutes of 13 *Eliz.* ; so that no mischief can happen from this in future. But a union may be made at this day notwithstanding those statutes.

Any defects in the patent, if any such there are, are cured by the statute of 1 *E. 6. c. 8.* which confirms the patent. *Adjournatur.*

Tr. 6 Car. A.D. 1630. B. R.

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Halsey v. Halsey. [MSS. Bridgeman.] (a)

DEMURRER upon a prohibition ; the case was this : — The parson libelled in the court christian for disturbance of the way for the carriage of his tithes out of the close, where they grew, alleging that was the usual way. The defendant there pleaded, that all the parsons of that church time whereof, &c. had used to carry their tithes out of another gate of the same close, which is the usual way for the owner himself for the carriage of his corn out of the said close ; *absque hoc*, that the usual way is through the other gate ; whereupon the defendant demurred.

Crawley serjt. argued for the defendant, that the determination, which is the usual way for carrying the tithes, is of ecclesiastical conusance, as well as the tithes themselves are ; and *qui obstruit aditum, destruit commodum.* *Littl.* Inclosure of the land is disseisin

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Disturb-
ance in the
road for the
carriage of
tithes is a
question of
ecclesiasti-
cal conu-
sance.
1 Jon. 230.
& C.

(a) Hargr. Bibl. Brit. Mus. No. 40.

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of the rent; and as 9 *Ass. p.* 19. 26 *Ass. pl.* 17. 3 *E.* 4. 2. are, to divert the water, so that it cannot run to the mill, is disseisin of the mill. In *F. N. B.* 51. *A.* if any of the parishioners disturb the parson or vicar to carry his tithes by the usual ways and passages, the parson may sue in the spiritual court for this disturbance. And at *Reading*, when the term was adjourned there, this very point was resolved accordingly in *C. B.* for the rectory of *Godden*. And where the jurisdiction is ecclesiastical, the common law will not meddle, though the spiritual court should make a wrongful award, but an appeal lies, as appears by *Dyer*, 5 *Co.* 1. *Cawdrey's case*, and 18 *E.* 4. 30. 2. The question being upon the usage of the way and concerning tithes, shall be determined in the spiritual court, because prescription in their law differs from prescription in our law. In their law, if the prescription be *cum titulo et per ecclesiam contra ecclesiam* the time of 40 years is sufficient: if *sine titulo*, then it shall be the time of 100 years, which they call *tempus memoriale*: and where the prescription is *per ecclesiam contra laicum*, or *per laicum contra ecclesiam*, there, the time of 20 years is sufficient if it be *contra absentes*, and ten years if *contra præsentes*. But our law observes no such difference; but in all these cases prescription must be from time whereof, &c.

[469] *Newdigate*, on the other hand, for the plaintiff, insisted, that the prohibition well lay in this case, 1st. Because the point in question is upon a prescription for a way for the carriage of tithes, which is *jus mixtum*, and of temporal conusance. If a man swear a false oath, he cannot be sued in the spiritual court *pro læsione fidei*, because it concerns a temporal matter. 2 *H.* 4. 10. 20 *E.* 4. 10. *F. N. B.* 42. 11 *H.* 4. 48. and 6 *Co.* 23. *Marquis of Winchester's case*, where a man devised by his will land and goods; on a suggestion that the testator was *non compos mentis*, the will was not allowed to be proved in the spiritual court, because it imported to concern land. 2. The parson in this case has remedy at common law. *Reg.* 105. he shall have trespass in such case. 33 *H.* 6. 11 *H.* 4. 26. 27 *H.* 8. 26. where a man has a way over the land of another, and it is stopped, the party shall have an assize of nuisance: but if the publick highway be obstructed, and a man suffer a particular injury by it, he shall have a special action upon the case. 3. The title to this way being by prescription, and the common law prescription differing from that of the spiritual law, as 8 *E.* 4. 13. and 2 *R.* 2. 19. it is therefore triable by the common law. *F. N. B.* 51. As to what has been objected to have been determined in this point, I answer, that our case differs from that case, 1st. Because here the parson is not totally disturbed of his way. 2. It does not appear that this is the usual way, &c. But by *Jones* and *Hyde*, in the absence of *Whillocke*, it is *primâ facie* against

the defendant; for as tithes are conusable in the spiritual court, so must the ways and passages for the carrying of them, since without such passages for their carriage the parson could not have the fruit of his tithes. And *Jones* said, that he was acquainted with a like case. The bishop of *Bangor*, as parson, was entitled to tithes in the land of *Sir Richard Buckley*, and there were great stones in the road by which they carried out the corn, and though *Sir Richard* could well pass this way, his horses being strong and able, yet the bishop's horses, being weaker, could not pass by it, and therefore the bishop sued him in the spiritual court; whereupon a prohibition was granted, but afterwards a consultation was awarded.

1631.

Halsey
v.
Halsey.

At length a consultation was awarded in the principal case by the whole court, and that upon the statute of 2 & 3 E. 6. *Lindwood De Decimis*, c. 3. saith, that the parson must have a convenient way, and that it must neither be craggy, nor swampy. And the spiritual court having conusance of tithes, which are the principal, shall also have conusance of the way through which it is necessary to convey the tithes; for *qui tollit medium, tollit finem*.

I doubted of this case at first; but I afterwards agreed in the judgement. (a)

Hil. 6 Car. A. D. 1631. B. R.

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Rawlins and others v. Wright. [Yelvertonian MSS.]

A MAN took the emblements growing on the land of another: and for the tithes of these the parson libelled him in the spiritual court: and adjudged well, though the party were but a trespasser, because occupier of the land. And so he is liable to answer damages in an action on the statute of 2 E. 6. (b)

Tortious
occupier of
land shall
pay tithes.

Hil. 6 Car. A. D. 1631. B. R. Rot. 784.

James Walrick and Thomas Lewis v. Richard Cropton.
[Yelvertonian MSS.]

IN an action upon the case the plaintiffs declared, that whereas on the 1st of *July*, anno 4 Car. they were proprietors of the tithes of grain then growing and arising from and upon the glebe lands of the vicarage of the church of *Chebsey* in the county of *Stafford*, and so continued from the said 1st day of *July*, in the 4th year aforesaid, to the feast of *St. Michael* the archangel then next following: and whereas the said *Richard* afterwards, on the 1st day of *July* aforesaid, in the 4th year aforesaid, was and still is vicar of the

If the com-
position
be general
the vicar
shall not
pay tithes
to the par-
son.

(a) As to ecclesiastical jurisdiction, see *Roberts's case*, 12 Co. Rep. 65. *supra*, 233.
(b) *Wilbraham v. Saunders*, *semble contra*. Raym. 76. *infra*, 544.

1631.

*Walrick
and Lewis
v.
Rich. Crop-
ton.*

vicarage of the church of *Chebsey* aforesaid, and then held and occupied, and still holds and occupies 14 acres of glebe land in *Chebsey* aforesaid, to the vicarage of the church of *Chebsey* aforesaid then and still belonging: the said *Richard* afterwards (to wit) on the said 1st day of *July*, in the 4th year aforesaid, at *Chebsey* aforesaid, in the county aforesaid, in consideration that the said *James* and *Thomas* had then and there demised to the said *Richard* all the tithes of grain then growing and arising from and upon the glebe land of the vicarage of the church of *Chebsey* aforesaid, for the sum of 22*l.* to be therefore paid to the said *James* and *Thomas*, undertook and then and there faithfully promised the said *James* and *Thomas* that he the said *Richard* the said sum of 22*l.* for the tithes of the said grain then growing and arising from and upon the said glebe land, of the said vicarage of the church of *Chebsey* aforesaid, would well and truly pay to the said *James* and *Thomas* when he should be thereto afterwards requested, &c. The defendants pleaded not guilty: it was found for the plaintiffs, and judgement was given and entered for

[471] them. In which case these two points were resolved — 1st. If a vicar be generally endowed of part of the glebe of the parsonage, in that case the vicar shall not pay tithes to the parson, *quia decimas ecclesia ecclesie reddere non debet*. But, if the endowment be special, that the vicar shall have so much of the glebe paying to the parson the tithes, this special composition shall bind the vicar: which composition evidenced to a jury by constant payment of tithes to the parson by the vicar shall be intended, though the composition itself be not shewn. 2. If a man lease tithes for years by deed indented, reserving 20*s.* annually, action on the case does not lie for these 20*s.* but debt: for though it be not properly rent, but in the case of the king, *Dy.* 876. yet it is a sum in gross of so high nature that no action on the case lies for it, but debt upon the contract. 5 *Co.* 3. *a.* *Jewell's* case. But, if it be without deed, then this action well lies: for it is not properly a lease, because it cannot be without deed, being of tithes. *Dy.* 117. *pl.* 72. nor is it an annual sum in gross in the nature of rent; but it is only an executory contract on a reciprocal assumpsit, which shall be intended in our case. (a)

Hil. 6 Car. A. D. 1631. B. R. Rot. 132.

Robinson v. Jo. Brooke. [Yelvertonian MSS.]

UPON evidence at bar it was agreed, if the vicar prescribes or shews a composition that the parson used to have only the tithe of corn, there, the vicar shall have the tithes of rape-seed and other

(a) *Sanders v. Regal*, *infra*, 537.

new tithes, as wood, hops, &c. but, if the vicar have only the small tithes, the parson shall have them, and not the vicar.

1631.

Robinson
v.

Ja. Brooke.

[*This case is thus reported by Sir O. Bridgeman.*]

P. 7 Car. B. R.

ROBINSON, the vicar, brought an action on the statute of 2 E. 6. for subtraction of tithes against *Brooke* and *Wood*, lessees of the parson of the same church, which was in *Kent*, and declared, that the vicar, from time whereof, &c. had all the small tithes, and that the parson had no other tithes but those of corn, and for subtraction of all the rape-seed which amounted to 40*l.* this action was brought, and issue being joined upon *nil debet*, the evidence was given at the bar. And *Henden* serjt. for the defendants, said, that rape-seed was but lately used in *Kent*, within these twenty years, and therefore could not be within the prescription. It is also in the nature of grain, because the land is ploughed for it, and it is sown as corn. But *per cur.* (*absente Whitlock*,) the vicar shall have it, because it shall be intended upon the first composition that the parson should have only the corn, and rape is not corn, but it shall be among the small tithes, and the prescription being for those, this shall be included. And so of hops, and woad for dying, which are of late use.

Rape seed
is small
tithes and
belongs to
the vicar.

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M. 7 Car. A. D. 1631. In Scac.

[*MSS. Turnor.*]

THE farmer of the impropriate rectory of *Pancras*, and the vicar of that church join in an *English* bill in the exchequer chamber, against several owners of several lands in *Kentish Town*, which is within that parish, and suggest divers moduses to be paid, some of them to the parson, and some to the vicar, and that the defendants have refused to pay them to the farmer of the parish and to the vicar, and that they have preferred this bill to avoid multiplicity of suits. The defendants demurred to the bill. 1. It was agreed, that a suit for tithes or a modus may be in this court. 2. The second doubt was, whether the farmer of the parsonage and the vicar can join in one suit for their several duties; or, whether they ought to prefer several bills. And *per Densam* and *Weston*, barons — They ought to prefer several bills, because the inheritances are now several and divided, though the vicarage originally was derived out of the parsonage: but it seemed to *Davenport*, C. B. that they might join in a bill in equity. But afterwards in his absence the demurrer was allowed, and the plaintiffs were ordered to prefer several bills.

Suit lies on
the equity
side of the
exchequer
either for
tithes or a
modus.

But parson
and vicar
cannot join
in one bill.

1632.

H. 7 Car. A. D. 1632. B. R.

Lockin
v.
Davenport.
Vendee of
grass before
it is cut
down must
pay the
tithe.

Lockin v. Davenport. [MSS. Yelvertonian.]

A MAN sold his grass to *A.* before it was cut down. The parson sued the vendor in the spiritual court, who pleaded the sale in that court, which plea not being allowed there, he had a prohibition upon the statute of 2 E. 6. because the owner of the grass ought to discharge the tithe. (a)

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Tr. 9 Car. A. D. 1633. B. R.

Andrews v. Lane. [MSS. Bridgeman.]

QU. Whether a custom to take every tenth basket of the first cutting of woad in discharge of the tithes of the second cutting be good, in consideration of the expence and trouble attending the cultivation and gathering of it.

Supra 223.

A PROHIBITION was moved for by *Calthorpe*, who had drawn his suggestion according to the direction of the court. It consisted of two points, 1. that by the law of the land no tithes shall be paid for the second cutting of woad: 2. that great costs are requisite to the planting and sowing of the land with woad, and gathering it in baskets after it is cut; in consideration whereof a custom has always prevailed, that the parson shall take the tenth basket of the first cuttings for all the tithes due for the whole year. And he cited *Co. Entr.* 459. *Baxter* and *Hope's* case (b), as a precedent in point.

Richardson C. J. — For the aftermath of grass no tithes are due by the law of the land, and many prohibitions have been granted upon that point, *quod fuit concessum*.

Calthorpe cited the case of *Aubrey v. Johnson* (c) 43 *Eliz.* to be so resolved: but *Richardson* C. J. said, that perhaps there might be a difference between the case of aftermath, and this of woad. And if you may prescribe in the custom to pay the tenth of the first cutting in discharge of the whole, though this may be a good custom, yet the cutting must not be fraudulent, you must not cut only a small part at the first; and leave the greater part, and that of the greater value for the other cutting.

Jones J. to *Calthorpe*. — How can you allege in your custom that woad has not been used in *England* time out of memory? *Calthorpe* answered, it is good enough, as in the case of saffron.

Berkley J. — The case of lattermath differs much from that of woad; for the tithes of the aftergrass are worth little or nothing, but the second cutting of woad is commonly better than the first.

(a) *Grant v. Hedding*, Hardr. 380. *infra*, 515. *Gibbs v. Wybourne*, Sir William Jones, 410. *infra*, 501. *Tassell v. Atkill*, Raym. 75. *infra*, 537.

(b) 2 Brownl. 30. 2 Bulstr. 239. *Co. Entr.* 459.

(c) The case of *Johnson v. Aubrey*, was as follows. *Aubrey* brought a prohibition in the king's bench against *Johnson*, parson of *Burghfield* in *Berkshire*, who sued him in the spiritual court for the tithes of the aftermath of grass: and the sugges-

tion in the prohibition was, that the occupiers of meadow ground within the parish have used to make the first vesture into hay, and pay the tenth cock thereof, in satisfaction of the tithe of such first vesture, and of the aftermath likewise. And it was adjudged to be a good prescription, and the prohibition stood. And in this case one *Nichol's* case was cited, where it was adjudged, that tithes shall not be paid for rakings, unless they are covinous rakings, in order to cheat the parson. *Moore*, 910. *Cro. Eliz.* 663.

The court appointed the case to be argued the next week. It was therefore afterwards argued by *Noy*, the king's attorney general, * that no prohibition should be granted. The suggestion, he said, consisted of two parts, 1. that by the law of the land no tithes are due of the second cutting, because no tithes are to be paid for the same land in one year : 2d. it suggests a particular custom, that in respect of the great costs and charges which the farmer sustains in the buying of the seed, and ploughing the land for it, and in respect that when it is ripe, and, that then *maturis temporibus anni* he gathers it, and buys baskets to put it in, and purges and cleanses it from the dirt, and that he does all this at his own cost, therefore that by reason of the premises and by the law of the land he ought to be discharged. Now this is merely a prescription *in non decimando*, and no such custom is allowed by the law of the land. But the contrary is frequent about *London*, where the same land is often twice sown in a year, for instance, at one time with peas, and at another with carrots, &c. and yet tithes are paid for both. They might as well prescribe, that if a man gather part of his apples at one time, and part at another, that he should be discharged of tithes of the second gathering. So, if the osiers which grow here on the banks of the *Thames* are cut down, tithes are paid as soon as they are cut. For if there is a double increase, why should there not be double tithes? And as to the case of aftermath which has been objected, clearly, aftermath is not discharged of tithes by the law of the land; but a difference has sometimes been taken, that upon a collateral prescription to give to the parson a reciprocal recompence, as to make the first math into perfect hay, when of right they need only make it into grass cocks, this will be a good prescription to be discharged of the tithes of the aftermath; but without such a prescription or recompence, it is not discharged. But here that which is shewn, that the farmer puts the woad into baskets, is no more than he ought to do of common right, and than is necessary for the severance of it from the nine parts; for he could not suffer it to lie upon the land to be severed. But, if he had prescribed, that from time whereof, &c. they have used, in consideration that they dried the first cutting, and ground it in the mill, and paid it in the ball, to be discharged of the tithes of the second cutting; that would be perhaps a good prescription: for he would do more than of common right he need do. In the 41 of *El.* in lord *Roper's* case, in the isle of *Thanet*, where tithes were paid of apples, and afterwards in the same year the apple trees were shredded and cut, and sold, it was adjudged, that new tithes were to be paid for the trees. In the case of aftermath, the second cutting is worth little or nothing; but in the case of woad, the second cutting is worth more than the first; and inasmuch as the second cutting is but an ex-

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crecence of a new thing out of the same root, I conceive that new tithes are due for it.

Richardson C. J. Jones and *Berkeley* seemed against the prohibition, and *Jones* said, that woad being within time of memory first used in this realm, he did not see how they could prescribe in this manner respecting it, so that he gave *Calthorpe* a further day.

It was afterwards argued by *Beare* of the *Middle Temple* in support of the prohibition. As to the case of lord *Roper*, he said, cited by Mr. Attorney, I answer that the apple-trees there were dead trees. He then cited *Barter* and *Hope's* case. As to the case of corn and hay, and afterwards of carrots upon the same land, as here about *London*, I answer, that there are several crops; but here it is but part of one and the same crop. As to the osiers upon the river *Thames*, I say that the reason of that is in respect of the covin. Then in the case at bar, no tithes should be paid of the second cutting for two reasons: 1st. because you shall not have tithes twice in one year of the same thing; and upon that ground the case of *lattermath* has been often determined: 2d. because here is more done than the parishioner ought to do of common right, and therefore it is a good *modus decimandi*. In *Ellis's* case, in 16 *Ja.* in consideration of putting the hay of the first math into windrows, and tedding and shaking it, the farmer prescribed to be discharged of the tithes of the second math; and held good; and there it was agreed, that no tithes shall be paid of stubble after tithes have been paid of the crop. So, it was resolved in this court, that where corn is severed, and tithes are paid for it, and afterwards grass grows, and beasts feed upon the same land, that no tithes shall be paid either for this grass, or the pasturage. In *Tr. 7 Car. C. B. Rot. 1449.* a custom to pay the tenth pound of wool was holden a good *modus decimandi*, because the owner is not bound of common right to weigh it. [*Jones J.* this last case was left doubtful.] In *Gibson* and *Trot's* case, 15 *Ja. B. R.*—one prescribed that in consideration that he bound up his corn in shocks, he hath always used to be discharged of the odd shocks, if there were any; and held a good prescription. [*Richardson C. J.* doubted of this.] The cases cited are still stronger than this: for here this woad is part of the same crop. And as to the objection that woad has not been in *England* from time whereof, &c. and therefore there can be no prescription in a *modus decimandi* for it; I answer, that woad has been common here for 50. or 60 [476] years, and then I say if they have used to pay the tithes of it in this manner but ten years, that is a good prescription for the church in the spiritual court upon the *modus decimandi*, and therefore if the farmers shall not avail themselves of the same prescription, they will be twice charged, once with tithes in kind, and again according to the custom.—*Calthorpe* said that they could prove that

woad had been used here for 100 years or more. He added, that the second cutting of woad is but *quoddam derelictum super terram*, as the rakings, &c. and that it is a thing of no, or, at least, very little, value.

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Palmer argued on the other side. — There are in our law some things which are not tithable, as quarries, coals, &c. But, where the things themselves are *res decimabiles*, there our law does not allow of any prescription *in non decimando*. As to the first part of the suggestion, that no tithes shall be paid of one thing twice in a year, I utterly deny it altogether, and I vouch *Plowden's Comm. Soby* and *Molins's* case, where tithes were held payable for the lopplings of hornbeam-pollengers, and also for the trees themselves, if they were cut down the same year. So *Dr. and Student, cap. ult.* and 43 *El.* between *Aubrey* and *Johnson*, where a difference agreed touching the aftermath, namely, that where the prescription is to make the first math into perfect hay, there it is a good *modus decimandi* for the second math, because there, there is a reciprocal benefit to the parson: it is otherwise, where it is to make it into grass cocks, for this is the parson's due of common right. *Tr. 3 Car. B. R.* one libelled in the spiritual court for the wool of rotten sheep, and a prohibition was prayed, upon a suggestion that he had paid tithes for the wool at sheering time, and therefore ought not to pay them again the same year; but it was determined to the contrary; and it was also agreed, that in that case if he had sold the sheep after sheering time, he should pay tithes for their wool *pro rata* before the sale. In *Lyndw. 141. b. 142. ver. "renovetur,"* he says, "*Si eadem terra bis vel ter seminata fuerit, vel sæpius fructum produxerit, dandæ toties sunt decimæ.*" So, of pigeons, and other creatures which breed often in a year. As to *Baxter* and *Hope's* case, that tithes shall not be paid of, &c. it is true, the court there did not grant a consultation because the rewine grass is a thing of no value; 2dly. it is by manuring the land to make it more fertile, being converted into dung: and 3dly. for the maintenance of their sheep.

Supra 134.

Supra 223.
473.

Vide supra
473.

As to the second part of the suggestion, that here should be a *modus decimandi*, I say that here is no recompence or consideration to the parson, and I refer to *Hall* and *Fettiplace's* case; there, there was a prescription to pay tithe cheeses between such a day and such a day to be discharged of all other tithes of milk in that same year; and adjudged a good prescription, because of common right the parishioner is not bound to make the milk into cheese. But it was resolved, that if the prescription had been, that in consideration he paid the tenth quart of milk between such a day and such a day, that would not have been good, for it is no more than he must have done of common right. The second cutting is of as great value as Qu.

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1633. the first cutting; and wood being but a new thing, there can be no prescription respecting it.

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Maynard acquainted the court, that in the case of the tenth pound of wool, cited by Mr. *Beare*, he was of counsel, and that they had a consultation, contrary to what *Beare* had said; to which *Jones J.* agreed.

Richardson C. J. — I consider this a very great and doubtful case; for I cannot conceive how payment of a part should be a satisfaction for the whole, and in effect this is so; and the second cutting being as good as the first, it would be a plain *non decimando*. As to the cases that have been put, to the contrary, I will agree to some of them. 1st. As to the case of the stubble, I agree that no tithes shall be paid of it, 1st. because tithes were paid of the corn, which is the principal, and the stubble is of no value; 2d. because in the case of stubble, there is no second renewing. As to the case of fruit, as apples, &c. I conceive that two tithes are payable. As to the aftermarth, I agree in the difference that has been taken by *Palmer*, and I will mention a case in the *C. P.* which arose in *Cambridgeshire*: — One prescribed, that where the grass grew in a wet place, in consideration of his carrying it out of such watery ground, and to another drier place to make it into hay, he was to be discharged from the tithes of the aftermarth; and held to be a good *modus decimandi*. As to the case of the grass which grew after the corn was severed, it might be perhaps, that there were no tithes of it, because of such small value. But in the case at bar, there is a new increase, and the law is, that *de omnibus renovantibus et crescentibus*, &c. tithes shall be paid. And as to the rakings, I hold that where the rakings are of great value, or if they are left on the land covinously, that tithes shall be paid of them; but if they are left there in a small quantity and involuntarily, it is otherwise; and therefore the words of the suggestion in such case are *minus voluntarie*. (a) So it was now lately resolved in this court for the locks of wool of sheep at sheering time upon this same distinction, where they are left in great quantity, or by covin, and where not. (b) This case shall be argued next term; and if the court should then have any doubt, it shall be afterwards argued by the counsel on both sides, and the court will deliver their opinion *seriatim*.

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Jones J. said, that he intended to have spoken to this, but that he subscribed to the rule of the chief justice.

Croke and *Berkley* accordingly; and they added, that notwithstanding what had been said, they were strongly of opinion, that no

(a) *Anon.* 1 *Freem.* 334. *infra*, 562. *Green v. Hunt*, *ibid.* *Nicholl's* case cited in *Johnson v. Aubrey*, *Cro. Eliz.* 663. *supra*, 473. *Green v. Hun*, *Cro. Eliz.* 702. *supra*, 215. *Sherington v. Fleetwood*, *Cro. Eliz.* 475. *supra*, 189. *Degge's P.C.* p. 2. c. 3.
(b) *Anon.*, *Mo.* 911.; 2 *Inst.* 652.; *God. Rep. case*, 462.; 1 *Rolle's Abr.* 646. *Degge P.C.* part ii. c. 6. *Foss v. Parker*, *Bulstr.* 242.

prohibition ought to be granted, and so they had been always, else they would not have consented, that the party should be delayed of his prohibition so long as *Michaelmas* term.

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Jones J. — If apples are gathered, part at one time, and part at another, there is no doubt but upon these several gatherings, there shall be several tithes paid.

Richardson C. J. — Here at *Fulham* they have peas which are early ripe, and sold at *London*, for which they pay tithes, and yet at harvest, when they cut down the remainder, new tithes are paid.

Croke J. agreed the difference which had been taken touching the aftermath by *Palmer* : and he said, that in this case the baskets are things of necessity for the use of the owner of the nine parts, and the second cutting is nearly as good as the first by the confession of the party himself. And as to the rewine, and rakings, and locks of wool, he took the distinction made by the chief justice, for *de minimis non curat lex* ; *aliter*, if in great quantities or by covin. And *Jones J.* was of opinion that there should be no prohibition ; for the providing of the baskets was for their own use ; that they might as well prescribe to be discharged of the tithes of corn, because they were at the charge of providing scythes to cut it down. Which *Berkley* agreed to, and said, that of pigeons and hens, and such creatures as bring forth twice in a year, double tithes are paid.

Richardson C. J. hesitated about agreeing to the case of osiers put by Mr. Attorney.

Jones J. — If you could make this the custom of an entire county, *consuetudo patriæ*, you might then prescribe in a *non decimando*, as in the case of the *Wealds of Sussex* ; *quod fuit concessum*. Adjourned to *Michaelmas* term, and no prohibition *interim*. (a)

M. 11 Car. A. D. 1635. B. R.

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Sydown v. Holmes. [Sir W. Jon. (b) 368.]

THE prior of *Bredsall* (c) was seised of lands in the parish of *Bredsall* before time of memory, and all the priors held them before time of memory exonerated from the payment of tithes : the lands came by dissolution to king *Henry* the eighth by the statute of 27 H. 8. the abbey being under the value of 200*l.* *per annum* ; the king made a grant of the lands, and by mesne conveyances they came to one *Bentley*, who leased them for years to *Sydown*. *Holmes*, the parson of *Bredsall*, sued *Sydown* in court christian for the tithes ;

In prohibition to a suit for tithes of abbey lands, if it appear that the abbot was exempted from the payment of them at the

(a) See *Norton v. Clarke*, *supra*, 428.

(b) This case is likewise reported by *Croke*, [Cro. Car. 422.] but Sir Wm. Jones's relation is more natural, more simple, and more circumstantial.

(c) The priory of *Brisoll*, *Breydesale*, or *Bredsall*, in the parish of *Bredsall* or *Breadsall*, in the county of *Derby*. In Sir Wm. Jones's Report it is called *Breadstall*, and in *Croke's*, *Bristol* ; easy mistakes from the similarity of sound.

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v.

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time of the
dissolution,
it shall be
intended an
exemption
by reason
of personal
privilege,
and not on
account of
any compo-
sition real.
Cro. Car.
422. S. C.

and a prohibition being obtained upon this surmise, the parson demurred to the declaration, and prayed a consultation.

The case was argued at the bar several times ; and this term it was argued upon the bench by the justices. Three of them, namely, *Brampstone*, *Jones*, and *Berkley*, agreed for the defendant, that a prohibition did not lie. *Croke e contra*.

The case was divided into two points. — The first was this : a priory holds lands exonerated of tithes by prescription : the lands come to the hands of a layman : afterwards, the priory is dissolved : whether the tenant of these lands shall have the benefit of this prescription without the aid of any statute or act of parliament ? The second question was, whether lands of an abbey, which came to the king by the statute of 27 *H.* 8. and were exonerated of tithes in the hands of the prior by prescription, shall be exonerated in the hands of the king, or of his patentee, by the statute of 27 *H.* 8. or the statute of 31 *H.* 8. ?

[480] As to the first point, all the judges unanimously resolved, that there were three manners of discharge from tithes without the aid of any statute, *viz.* by privilege or bull ; 2. by real composition and prescription *in modo decimandi* ; 3. by general prescription *in non decimando*. The first, namely, by privilege, was confined to the Templars, the Hospitallers, and Cisterrians, who were exonerated by a general council (as it seems) ; for it is said by *Panormitan*, *capite ex parte decimis*, *Quod privilegium non solvendi decimas datur in apice juris canonici Cisterciensibus, Hospitalariis, et Templariis solummodo, et non aliis monachis quibuscunque*. 2. Several abbeys were discharged by the pope's bull, sometimes granted to an order, as to the Præmonstratenses, or to a particular abbey. These were personal privileges, *et omnia personalia privilegia* (as *Panormitan* there saith) *certam habent interpretationem, et non transeant de unâ personâ ad aliam*. If therefore a corporation which had such a privilege was dissolved, or its lands were granted over to another, the privilege was gone, and the grantee or feoffee of the lands must pay tithes.

The second discharge is by real composition. This, as it appears in the *Register* 438. and *F. N. B.* 41. 43. is, when a sum of money, or lands, are given to a person by the assent of the patron and ordinary, in recompence of all manner of tithes ; there, the land is discharged of tithes in *specie*, and the modus is made tithes : and if the lands are transferred or granted to another, the feoffee or grantee shall have the benefit of it : and upon the ground of a real composition, a *modus decimandi* by prescription is maintainable upon a presumption that there was a real composition, which is lost.

Supra 167. *F. N. B.* 41. *Regist.* 98. 8 *E.* 4. 14. and 2 *Rep.* 43. bishop of *Win-*

chester's case: and of such a prescription any one, who has the land, shall take advantage.

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The third is a discharge *in non decimando*, either in specie or otherwise, by prescription, of which an ecclesiastical person only was capable, as appears in the bishop of *Winchester's case*: for a layman, by the council of *Lateran*, was not capable of tithes either in perannuity, or in discharge; but an ecclesiastical person was capable of both, and was not bound by that council.

Thus far all agreed; but *Berkley* went farther, and said, that the prescription must be intended to have been either upon a privilege, or upon a real composition before time of memory. Privileges were the more frequent; the other was rare: in the present case, therefore, it must be presumed that it was founded upon a privilege in the beginning; and if so, it will follow the nature of the beginning, namely, a privilege; and all privileges, as was said before, were personal, and were extinct with the person, and therefore the prescription shall be extinct. And so he held, that in this case the prescription was personal, and extinct by the dissolution of the corporation, and could not be extended to the king or his patentee.

And *Croke* agreed, that if it must be presumed to be upon the ground of privilege, that then it was gone; but he said, that it shall be presumed to be upon a real composition, and then the tenant of the land shall have the benefit of it. But he gave no reason to shew, that such presumption ought to be made. [461]

Jones agreed to the ground taken, namely, that if the prescription shall be intended to be upon the idea of a privilege, then the prescription was gone, and determined with the person. And *Brampston* agreed to this, and that it was a stronger presumption than that it was grounded on a real composition. And *Jones* insisted, that it should not be taken to be upon a real composition; for though a prescription *in modo decimandi* by payment of a sum of money was good upon intendment that it was grounded upon a real composition, for the payment of the sum is good evidence of that; yet in a *non decimando* this does not hold; and so it is resolved in the bishop of *Winchester's case*, 2 *Rep.* And *Brampston* and *Jones* said, that there might be an intendment of another sort of the commencement. It is said before, that ecclesiastical persons were capable of tithes in perannuity, and of an exoneration from the payment of tithes, and were not bound by any canon or council: that therefore may be the commencement of the prescription; and if so, it is personal, it is tied to the church, *et non egreditur personam*: when therefore the land comes to the hands of a layman the prescription is gone. *Jones* added, that inasmuch as a layman is not capable of a prescription *in non decimando* in himself, nor in his ancestor, he

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Lands appurtenant to religious houses, or to abbeys given to the king on the dissolution of the lesser abbeys under 200*l.* a year by the 27 *Hen. 8. c. 28.*, are not exempted from the payment of tithes, for the privilege is not revived by stat. 31 *Hen. 8. c. 13.*

* [482]

cannot be capable in a *que estate*. So that the three justices held, against the opinion of *Croke*, that the privilege of prescription was gone by the dissolution of the abbey.

As to the second question, they divided it into two considerations; the one, upon the statute of 27 *H. 8.* only; the other, upon the statutes of 31 *H. 8.* and 27 *H. 8.* conjointly.

Croke held, that by the statute of 27 *H. 8.* this privilege by prescription, as well as all other privileges and exemptions from tithes, was reserved, and given to the king by the words of the act. It gives "all rights, and interests, and hereditaments, and that in as large and ample manner as the abbots held them;" and this privilege was "an hereditament, and a right, and an interest;" and the lands were given "in as large and ample manner as the abbot himself had them;" and he held them discharged of tithes. And farther, the intention of the act was to give the privilege for * these abbies, as well as other abbies, which came to the king by 31 *H. 8.*

The three other justices held, that this privilege was not preserved nor given to the king by this statute, for the words of the statute being general do not extend to this particular privilege, which is not any thing in *right*, or *interest*, nor properly an *hereditament*; but a matter of discharge merely. The marquis of *Winchester's* case, 3 *Rep.* proves this, where these words, "*right, interest, hereditament, and in as ample manner*" in an act of parliament, do not extend to a writ of error, or right of action. 2. No such intent appears in the statute; for if the legislator had any such, there would have been a clause of exemption, as there is in the statute of 31 *H. 8.*

Croke also held, that admitting that this privilege is not preserved and given to the king by the statute of 27 *H. 8.* yet, taking the statutes of 31 *H. 8.* and 27 *H. 8.* together, it is saved; for, 1st. the words of 31 *H. 8.* extend to it. 2d. If not, it is within the equity of it. As to the words, abbies under 200*l. per ann.* were not dissolved until after the end of the parliament of 27 *H. 8.* and then the words of the 31 *H. 8.* extend to all abbies that came to the king after 4 *Feb.* 27 *H. 8.* 2. Although in fiction of law, a statute shall have relation to the first day of the parliament, yet, in truth, nothing is settled, nor is it a perfect statute, until the parliament is ended, and that was after the 4th of *Feb.* 27 *H. 8.* so that the words of 31 *H. 8.* extend to it: and the king shall not have the mesne profits accruing between the commencement of the parliament and the end of it. 3. The words of 31 *H. 8.* are in the purview "*all abbies*," without distinction. Farther, admitting that the words do not extend to this privilege, yet it shall be within the equity of the act. For it was the intention of the statute of 31 *H. 8.* to give the king equal benefit of the abbies given by the

27 H. 8. as of those given by 31 H. 8. and all were within the survey of the court of augmentations; and it was to encourage purchasers, which goes as well to the one as to the other. And, lastly, *Croke* insisted upon contemporary exposition, and said, that several prohibitions (a) were granted upon these statutes in the beginning of queen *Elizabeth's* reign, and constantly afterwards, and in this case now in question, between *Berry*, the owner of this land, and the parson, a prohibition was heretofore granted; whereupon he concluded, that this privilege was preserved either by the words of the statute of 27 H. 8. or by the equity of it; and if not by that statute, yet, by a conjunction of the statutes, it is given by the words, or by the intent of 31 H. 8.: for the clause of exemption from tithes in 31 H. 8. does not in words extend to monasteries dissolved after the 31 H. 8. but only to those dissolved before, and yet, (as it is resolved in the archbishop of *Canterbury's* case, 2 Rep.) this clause of exoneration from tithes in 31 H. 8. extends by equity to monasteries dissolved afterwards.

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The three other justices were of the contrary opinion in both points, namely, that the clause of discharge from tithes in 31 H. 8. does not extend either by the letter, or the intent of it, to monasteries dissolved by 4 Feb. 27 H. 8. *Berkley* insisted upon two reasons; the one, that the right of tithes *de mero jure* belongs to the parson of the parish; and when the abbies were dissolved by 4 Feb. 27 H. 8. the right of tithes was revived to the parson; and those things which are extinct cannot be revived by the general words of the act of 31 H. 8. 2. He held, that the parson was within the saving of the 31 H. 8. for he is not within the exception of the saving, namely, "donor, founder," &c.

Jones did not rely (as he said) on these reasons; for, if monasteries were spoken of, this extends to abbies dissolved after 27 H. 8. and before 31 H. 8. as well as to abbies dissolved by 27 H. 8.; and the words too of the act are express to give a discharge of tithes; all discharges were within the intention of the act. And 2. the clause of exemption is after the saving; and the saving extends only to things before.

Brampston C. J. said nothing to this; but they all agreed in one thing, that the 31 H. 8. does not give any aid in this case; for the statute speaks in express terms of monasteries after the 4 Feb. 27 H. 8. which came to the king; and the clause of exemption was intended for those abbies, which came to the king by force of that

(a) The cases referred to by *Croke* are stated in his report, and are 7 Eliz. Rot. 254. and *Hayant*, in B. R. P. 27 Eliz. Rot. 328. *Cogall* and *Fairfax*, in B. R. P. 37 Eliz. *Smith* and *Patenson*, and in 40 Eliz. Rot. 679. *Berley* and

Walter, which is the same case with that which is called *Berry's* in the text, in all which prohibitions were granted upon the surmise that the land came to the crown by the statute of 27 H. 8.

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statute, and not to other lands that were given to the king before or afterwards by another act of parliament; as was resolved in the archbishop of *Canterbury's* case, 2 *Rep.* for *Maidstone* college.

Jones answered *Croke's* reason: 1. That the abbies were not dissolved until after the statute of 27 *H. 8.* and he said, that the statute of 27 *H. 8.* adds a much stronger clause different from 31 *H. 8.* The statute of 27 *H. 8.* gives to, and vests in, the king all abbies and their possessions, that were under 200*l. per annum*, and by that the king had them in actual possession without any other act or thing to be done; and some of the abbies too were dissolved within a year before, and given to the king by the act in possession. But the 31 *H. 8.* we see, does not give any abbies to the king, but only vests in the king the actual possession of all abbies which were surrendered, or should be surrendered; and without such surrender they were not given to the king. But *Jones* said that though this be true in the general, yet the statute in particular cases gives the lands of abbies to the king, as of those abbies which were of the donation or foundation of common persons, the lands of which would by the dissolution escheat to the founder, if there were no act: but the statute of 31 *H. 8.* gives the lands to the king in that case; so that *Croke's* first objection is answered.

As to the relation of the act of parliament, they said, that it shall have relation to every purpose to the first day of the parliament, and shall vest the land that day in the king, and the king shall have the mesne profits from the first day of the parliament. And this was agreed by several authorities; *vide Partridge* and *Croker's* case in *Comm. (a)* 38 *H. 6.* *Pilkington's* case, &c.

And *Jones* said, that the words of the act go only to abbies dissolved after the 4 *Feb.* 27 *H. 8.* for the preamble of the act speaks of divers abbots, priors, &c. of the said monasteries and priories; and there is no mention of any other monasteries but those which were dissolved after 4 *Feb.* 27 *H. 8.* and though in the beginning the words are general, *all* monasteries, priories, &c.; yet that is restrained; for the patentees shall hold the land exonerated of tithes free as the *said* abbots and priors held them; and the *said* abbots are only the abbots of the *said* houses mentioned in the preamble, and those were abbies that were dissolved after 4 *Feb.* 27 *H. 8.* And as to the case urged, that the said clause was taken by equity, out of the *Maidstone* college case; that was for another reason; for there, though the abbies were dissolved after 31 *H. 8.* yet those were vested in the king by that act; and it was the intent of the statute to give equal benefit in monasteries dissolved after, as to those which came to the king by, that statute. But

(a) Flouiden's Reports, 77.

here, there does not appear to be any intention to extend this clause to another act of parliament made before, no mention * being made of that act, but there being rather an absolute exclusion.

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As to contemporary exposition, and precedents, they answered, that the rule of contemporary exposition does not hold *in omnibus*; for in the archbishop of *Canterbury's* case the contemporary exposition was *e contra*, but there was no express resolution on the point until that time, and upon great debate the exposition was altered. And in our case there is no resolution *e contra* before. And as to precedents, it was answered, that many of these points pass *sub silentio*, but there is no direct judgement on the other side. It was resolved and adjudged in *Wright and Gerard's* case, 18 *Ja. C. B.* that the statute of 27 *H. 8.* does not preserve the privileges of exemption from tithes: and 31 *H. 8.* does not give or preserve any such privileges in case where abbies came to the king by the 27 *H. 8.* In the same manner both these points were resolved in the exchequer, 4 *Ja.* in the case of *Ward and Clarke*. And in the argument of *Weston and Whitton's* case in this court, it was agreed accordingly by *Hyde, Dodderidge, Jones, and Whitlock*. They concluded, therefore, that a consultation should be awarded.

Supra 189.

Supra 375.

Supra 410.

In this case, in short, these points were resolved: 1st. That an abbot or ecclesiastical person may prescribe *in non decimando*: but, when the corporation is dissolved, or, when the corporation grants the land to a layman, such layman shall not have the benefit of the prescription; for it was personal to the abbot.

1st point resolved.

2d. It was resolved *per totam turiam*, that this privilege by prescription, and other personal privileges, by bull or order, belonging to abbies which were under 200*l. per annum*, and dissolved by 4 *Feb. 27 H. 8.* were not preserved and given to the king by that statute.

2d point.

3d. That privileges by prescription, or by order or bull, are preserved by the clause of 31 *H. 8.* and neither the king, nor his patentee shall pay tithes. But this extends only to monasteries dissolved *after 4 Feb. 27 H. 8.* and therefore the lesser abbies under 200*l. per annum* which were dissolved by 4 *Feb. 27 H. 8.* are not included within the said clause of 27 *H. 8. (a)*

3d point.

(a) *Slade v. Drake*, Hob. 295. *supra*, 385. *Rose v. Calland*, *infra*, 1620. *Charlton v. Charlton*, 389. *Hicks v. Woodeson*, *infra*, 550. *Jennings v. Lettis*, *infra*, 952. *Fanshaw v. More*, *infra*, 780. *Fanshaw v. Rotheram*, 1 Eden, 276. *infra*, vol. ii. *Ozenden v. Skinner*, *infra*, 1513. *Toller*, 173. *Berney v. Harvey*, 17 Ves. 119. *Meade v. Norbury*, 2 Pri. 338. *infra*, vol. ii.; *Degge's P.C.* part ii. c. 21.;

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A forest discharged of tithes whilst in the king's hands, in right of his prerogative, is not discharged in the hands of the patentee.

Hil. 11 Car. A. D. 1636. B.R.

Earl of Hertford v. Leech. [MSS. Calthorpe.]

THE plaintiff declareth, that whereas *E. 6.* 13 *July*, 1 *E. 6.* was seised of the forest of *Savernack* (a) in the county of *Wilts*, whereof eight acres of pasture called *Earl's Heath* are, and time out of mind have been, parcel in fee in the right of his crown of *England*: and whereas the said late king *E. 6.* and all his progenitors, late kings of *England*, were seised of the forest aforesaid, with the appurtenances whereof, &c. in fee as in right of the crown of *England*, and the said eight acres of pasture called *Earl's Heath* time out of mind had holden and enjoyed acquitted, discharged, freed, and privileged of and from the payment unto the proprietor or farmer of the rectory of *Burbadge*, of any tithes whatsoever, of, from, and upon the said eight acres of pasture, with the appurtenances or any part thereof, yearly for all the time aforesaid growing, happening, renewing, or increasing: and the said *E. 6.* being of the forest aforesaid, whereof, &c. in form aforesaid seised, and holding the aforesaid eight acres of pasture acquitted, discharged, freed, and privileged of and from the payment to the proprietor or farmer of the rectory of all manner of tithes growing or renewing in the said eight acres, did, on 24 *July*, 1 *E. 6.* under his great seal of *England*, grant the said forest, with all liberties and privileges to the said forest belonging, unto *Edward* duke of *Somerset*, and the heirs males of his body; that the said *Edward* duke of *Somerset* died, and the said forest descended unto the said *Edward* earl of *Hertford*, as son and heir male of the said duke; 25 *May*, 13 *Ja.* the said earl of *Hertford* made a lease of the said eight acres to *Wm. Noyes* the plaintiff; and that by the statute of 2 & 3 *E. 6.* it is enacted, that

[487] no person shall sue or be compelled to give or pay any tithes for any manner of lands, tenements, or hereditaments which by the laws or statutes of this realm, or by any privileges or prescription, were not chargeable with the payment of any tithes, or which were discharged by any real composition; and whereas the said eight acres by prescription time out of mind, by the laws and statutes of this realm, were not chargeable with the payment of any tithes unto the proprietor of the rectory of *Burbadge*, but freed and discharged from the payment of all manner of tithes unto the said

(a) The very same question with respect to the same forest arose in the case of *Noyes and Crosse*, 16 *Ja.* and it is the declaration in that case which *Sir Henry Calthorpe* recites in the introduction to his argument. The only difference between the two cases is, that in that case the question was between the rector and the lessee of the patentee; in this case, it is between the rector and the pa-

tentee himself. Whether the case of *Noyes* and *Crosse* ever received any judicial determination, I know not: the pleadings may be found in *Winck's Entries*, 641. I have met with the arguments of *Henden* and *Asley*, serjts. in that case in *Turnor's* manuscript reports: but they have not enough of novelty or ingenuity to justify my extending the work by the insertion of them.

proprietor of the said rectory of *Burbadge*; that nevertheless the defendant had libelled against him for tithes.

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To this declaration the defendant demurred.

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So as the mere question in this case is, whether this was such a discharge of payment of tithes in king *Edward* the sixth, as that the patentee, after such time as the king hath granted the forest to him and his heirs, shall be capable of this discharge of tithes, and shall be discharged of payment of tithes. And I * conceive that it is; for this discharge of payment of tithes of the forest of *Savernack* that was in the king, was a real discharge of payment of tithes, and not a personal privilege; and it being a real discharge, and not a personal privilege, the patentee is as well capable of the same, as the king himself was, during the time that the forest was in the hands of the king.

* *Calthorpe.*

M. 11 Car. Sydown v. Holmes. In that great case that was so solemnly argued in this court by all the judges, although it was adjudged, that where the abbey came unto the king by the statute of 27 *H. 8.* and the prescription was, that the abbot and his predecessors had time out of mind been discharged of payment of tithes, yet this prescription would not serve the turn upon the statute of 27 *H. 8.* because it should be taken to be a personal privilege, whereof none was capable but the abbot himself; but, it was there agreed by all, that if the discharge of payment of tithes had been a real discharge, as, if there had been a real composition, or something given formerly in lieu of those tithes; there, the discharge should have gone with the land, so as whosoever had the land should be discharged of payment of tithes; according unto the *Register* 38. and *F. N. B.* 41.

Supra 479.

And for the proof that this is a real discharge, I conceive it will be material to shew, that the settling of payment of tithes in this kingdom of *England*, is merely grounded upon decrees and upon councils: for, although tithes were paid in some kind, yet the settling of parochial rights and the fixing of payment of tithes upon the parson of that parish where the lands did lie, was made by decrees and councils.

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Seld. Hist. 81. It is said, that the parochial priests had not at first such a particular interest in the profits received in oblations, as of later time. All that was received wheresoever in the bishoprick, was as a common treasury to be so dispensed. One part was allowed to the maintenance of the ministry, out of which every parochial minister had his salary; another to the relief of the poor, sick, and strangers; a third to the reparation of churches; and a fourth to the bishop. *Concil. Antioch.* 103. & 104. and *Urban* c. 12. q. 2. c. 26. *Synod. Rom. sub. P. P. c.* 5. and *Gelas. Decret.* c. 27.

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Id. 80. The word *Parœcia* or *Parish* at first denoted a whole bishoprick, (which is but as a great parish) and signified no otherwise than Diocese; but afterwards was confined to what our common language restrains it. The curates of those parishes were such as the bishop appointed under him to have care of souls in them; and those are they whom the old Greek councils call *πρεσβυτεροι επιχωριοι*, or *οι εν ταις χωραις*, or *εν ταις κωμαις πρεβυτεροι*, that is, *Presbyteri Parochiani* within the bishoprick. These had their parishes assigned them, and in the churches where they kept their cure, the offerings of devout christians were received, and disposed of in maintenance of the clergy and relief of distressed christians by the *Oeconomi*, *Deacons*, or other officers thereto appointed under the bishop. *Concil. Gangr. Can. 67.* and *Chalced. Can. 204.*

Id. 58. *Concil. Matic. Can. 5. A. D. 586. Leges decimæ consulentes sacerdotibus ac ministris ecclesiarum pro hæreditariâ portione omni populo præceperunt decimas fructuum suorum locis sacris præstare, ut nullo labore impediti per res illegitimas spiritualibus possint vacare ministeriis; quas leges christianorum congeries longis temporibus custodiret intemeratus. Unde statuimus, ut decimas ecclesiasticas omnis populus inferat, quibus sacerdotes aut in pauperum usum, aut in captivorum redemptionem erogatis, suis orationibus pacem populo ac salutem impetrent.*

Id. 72. *Quicumque decimam abstrahit de ecclesiâ ad quam per justitiam, dari debet, et eam præsumptuosè, aut propter munera aut amicitiam, vel aliam quamlibet occasionem, ad aliam ecclesiam dederit, a comite vel misso nostro distringatur vel ejusdem decimæ quantitatem cum suâ lege restituat. Leg. Longobard. Lib. 9. tit. 3. c. 7.* So, another was made against persons under pain of deprivation, that [489] they should not persuade parishioners to come to their churches, *et suas decimas sibi dare. Benedict. Levita. lib. 7. c. 141.* With which agrees the complaint made about the same time in the council of Pavia against such as used to give away their tithes *aliis ecclesiis pro libitu.* And many express examples are of such grants made, not otherwise than as of rents-charge arbitrarily created. *Synod. Ticinens. c. 16. q. 1. c. in sacris Canonibus 56.*

And although out of any continuance alone of voluntary payment, a kind of parochial right (which also by the laws of the time every rector should have enjoyed in the territory where he dispensed the sacraments) were created; yet consecration of tithes (not yet established by a civil title) made to the church of another parish at the lay-owner's choice, were practised and continued in force; as may plainly be collected out of an old law made (but not put in execution) for punishment of such consecrations by compulsion of the party to restore to the church the quantity of the tithe so aliened.

Lindw. Lib. 3. De locato et conducto, ver. "portiones." Hæ portiones potuerunt pervenisse ad locum religiosum de concessione etiam laici cum solius diocesanî consensu de decimis vel proventibus quas laicus talis ab ecclesiâ aliâ habuit in feudum ab antiquo. Et hoc verum, si tales portiones decimarum eis donatæ fuerunt ante Concilium Lateranense, quod celebratum fuit anno Domini 1179, tempore Alexandri tertii, qui fuit Senensis. Nam ante illud Concilium bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ vel monasterio dare; non tamen post tempus dicti Concilii.

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2 Rep. 44. Bishop of Winchester's case. — It is resolved, that a mere layman that was not capable of tithes in pernaney, was yet capable of the discharge of tithes at the common law in his own land, as well as a spiritual man: for, by the common law, the parson, patron, and ordinary, might have discharged a parishioner of tithes in his own land; or the parishioner might have given part of his land to the parson for discharge of his tithes in the residue. 8 E. 4. 14. Register 38. And there it is said, that it is commonly said in our books, that before the council of Lateran, every man might have given his tithes to any ecclesiastical person that he would.

Supra 167.

7 E. 6. Dy. 84. A portion of tithes, is, where a man hath any profit of tithes within the parish of another parson or vicar. And the original of it is ante concilium Lateranense, quo tempore licebat unicuique distribuere et solvere liberè pro libitu suo decimas suas seu aliquam portionem inde cuicumque ecclesiæ secundum meliorem discretionem suam, and there was no restraint to any church or parish in certain. So, by continuance it accrued to a right or title; and this was so given for prayer or devotion. 8 Ass. pl. 25. doth agree with this. 44 E. 3. 5.

Supra 123.

10 H. 7. 18. Before the council of Lateran every man might give his tithes unto any curate; at which time it was decreed by the same council, that from time to time no man should grant or give his tithes, but to his proper curate.

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7 E. 3. 5. By Herle. — The tithes that are out of any parish may not now be granted to whom a man wills; for the bishop of the place shall have them. And it is against reason, that a man may not give his alms unto whom he wills.

Seld. 76. The bishop of Xaintonge maintained, that no church lands were to pay tithes to any church. And Godfrey, abbot of Vendosme, sharply corrects him in an epistle, saying, *Nobis dictum est quia dicitis, quòd ecclesia non debet decimam dare. Hoc verum est, ubi ecclesia nihil habet in paræciâ alterius ecclesiæ; ubi vero ecclesia in alterius ecclesiæ paræciâ possessionem aliquam habet, vel quippiam quod decimari debeat, ibi ecclesia ecclesiæ decimam reddere debet, si illud justè possidere desiderat.*

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* See New-
court's Re-
port, vol. i.
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Hil. 9. Ja. A free school is built upon part of the church-yard of *Paul's in London*: tithes shall not be paid of it unto the minister of *St. Faith's* *: for *ecclesia ecclesiæ decimas non solvit*.

Hil. 37 Eliz. B. R. A vicar is endowed *de minutis decimis*: he shall not have the small tithes of the glebe of the impropriate parsonage; inasmuch as this was discharged before in the hands of the parson. But, if the glebe come into the hands of a layman severed from the appropriation, tithes shall be paid of it both unto the parson and unto the vicar.

Seld. 112. Infeodations of tithes unto laymen were ordinary until the council of *Lateran* holden 1078, at which time the canon was made, *Decimas quas in usum pietatis concessus Canonica auctoritas demonstrat, a laicis possideri apostolicâ auctoritate prohibemus. Sive enim ab episcopis, vel regibus, vel quibuslibet personis eas acceperint, nisi ecclesiæ reddiderint, sciant se sacrilegii crimen incurrere.* Which in the same syllables is iterated in the general council of *Lateran* holden in 1139.

Id. 117. Princes sometimes joined with the bishop to bring in the payment of tithes, that thereby themselves might have beneficial infeodations of them from the church. But, as princes made infeodations out of their own demesnes, or their own churches, so other private lay persons: and the clergy sometimes of tithes already [491] vested in them, and sometimes, it seems, out of their demesnes. *Schaffrsburg. A. D. 1073.*

Id. 284. It appears, that in 11 *H. 3.* a special grant was made by the king, that tithes of hay and mills should be paid thenceforth in all his demesne lands, which before then had not been paid. *Dominus rex, saith the patent, de concilio archiepiscoporum et episcoporum suorum concessit, ut decimæ fœni et molendinorum de singulis dominicis suis in regno suo de cætero præsentur. Et mandatum est ballivis de Corsham, quòd de dominico suo de Corsham decimas fœni ecclesiæ de Corsham dari faciant. T. R. apud Westmonast. xlviii. die Maii. Rot. claus. 11 H. 3. p. 1. m. 9. in dorso.* And according to this were divers close writs sent in the following years, as appeareth by 12 *H. 3. m. 7. in dorso, & claus. 17 H. 3. dorso 16. & dors. claus. 20. H. 3. m. 24. & claus. 21 H. 3. m. 10.*

Id. 285. 33 E. 1. in the petitions of the parliament, *De personis et vicariis petentibus decimam in Cornubiâ ubi rex solvit annuatim Episcopo Exoniensi pro decimâ; ita responsum est, Fiat sicut consuevit tempore comitis et regis.* The earl and king here meant are *R. 1.* and *H. 3.*

Rot. Parl. 4 H. 3. m. 1. & claus. 5 H. 3. m. 6. The bishop of *Exeter* had the tithes of the profits or rent of the stannaries there anciently given and paid to him.

Seld. 435. A writ of *Scire facias* was grantable anciently for tithes before the statute of 18 *E. 3. c. 7.* upon patents of tithes legally granted by the king, when against the grant any clergyman by the canon law took them from the patentee.

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Id. 436. 21 *H. 3. m. 19. Rot. claus. 21 Rot. Parl. 8 E. 2. Rot. 23.* *Per petitionem in consilio*, the abbess of *Godstow* hath a writ directed *Custodi equitii sui de Woodstock, &c.* which relates, that *ex parte dilectæ nobis in Christo Abbatissæ de Godestow per petitionem suam coram nobis in concilio nostro exhibitam, nobis est ostensum, quòd cum per cartas progenitorum nostrorum quondam regum Angliæ concessum sit ei, quòd ipsam decimam omnium in manerio nostro de Wodestoke, et parco nostro ibidem per annum renovantium percipiat et habeat; prætextu cujus* the abbess and her predecessors had enjoyed it; and that the bailiff kept from her the tithe of the colts bred in the same park; wherefore, it commands him to restore them, if they be so due.

P. 7 Ja. in the exchequer, *Sir Carew Rawleigh* against the vicar of *Gillingham*. The case was thus: The vicar libelled against the keeper of the forest of *Gillingham* for tithes of beasts agisted within the forest of *Gillingham*; and upon a surmise made of the special matter, and of the payment of 8s. by the year in satisfaction of all manner of tithe, a prohibition was granted. And it was resolved, that the king was not to pay tithes for any part of his demesnes, except they have used to pay tithes of the same land; and a judgement in 31 *Eliz.* was cited to be accordingly. And the beasts being agisted whilst the forest was in the hands of the king, no tithes are to be paid of it. But, of beasts commoning in the chase of the king tithes shall be paid; and farmers of the king for life or for years shall pay tithes; but not tenants at will of the demesnes of the king.

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Hil. 37 Eliz. B. R. in the case of the earl of *Shrewsbury*. A surmise was made, that _____ had been the house of the king, and that the house was out of every parish; and a prohibition was granted upon this surmise.

Seld. 351. *Henry* the second gives to the church of *Sarum* divers churches with tithes, and among them, *Ecclesiam de Durnefordâ, &c. et omnes decimas de Novâ Forestâ, et de Panetot, et de Bucholt, et de Andeverâ, et de Husburnâ, et omnibus forestis meis de Wiltshire et de Dorseta, et de Berkeshire, de omnibus rebus, scilicet, de firmâ, de pasnagio, de herbagio, de vaccis, de caseis, de porcis, de equabus, et omnes decimas de omni venatione prædictarum forestarum, exceptâ decimâ illius venationis quæ capta fuerit cum stabilia in Forestâ de Windleshordâ, &c.* What the bishop had yearly by reason of this grant, may be seen in *Rot. claus. 5 H. 3. m. 14.* And for grants from the king of the tithe of venison other examples are obvious;

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as, of the forests of *Essex* to the bishop of *London* by king *John*, and of others anciently, &c. *Rot. Chart.* 6 *Johannis*, ch. 107. m. 12. 11 *H. 3.* p. 1. m. 5. — 4 *H. 3.* *Rot. claus.* p. 1. m. 2. and *Rot. claus.* 17 *H. 3.* m. 4. a grant was made of the tithe of the venison taken in the forests in *Northamptonshire* to the abbot of *Bury*.

Id. 364. *Inter fasciculos petitionum parliament.* 6 *E. 1.* in arce *London.* *Nicholas* of *Cranford*, parson of *Gillingham*, complained unto the king, *Quòd cum foresta domini regis, ibidem sita, sit infra parochiam suam, quòd dominus rex decimam feni, venationis, pannagii, et aliorum proventuum ipsius forestæ de gratiâ et pro salute anime suæ, et animarum predecessorum suorum ecclesiæ suæ cui de jure communi debentur plenè solvi præcipiat secundum formam supplicationis et exhortationis apostolicæ porrectam domino R. apud Gillingham, quando fuit ibi æl natale.* What was that *supplicatio* or *exhortatio apostolica*? did not some such thing coming from *Rome* about the time of the council of *Lyons*, make the monks think it a thing agreed upon in that council? It seems here too, that, in the king's case, parochial right of tithes was not every where settled, although the tithes were increasing in a parish.

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Id. 444. 7 *H. 3.* *Rot. claus.* p. 1. m. 6. The king directs his writ to *Brian de Insula*, keeper of the forest of *Sherwood*, telling him, that *pro salute animæ domini Johannis regis, patris nostri, concessimus monachis de Basingwere, quod percipiant hæc vice usque ad festum S. Michaelis, anno regni nostri vii. decimas de bladis seminatis in defenso nostro inter Blakebroc & Glassop, et ideo vobis mandamus, quod ipsos monachos hæc vice sine impedimento permittatis decimas prædictas percipere.*

Id. 445. So in *Rot. claus.* 5 *H. 3.* p. 2. membr. 14. the bishop of *Salisbury* hath 50 shillings yearly *nomina decimæ* out of *New Forest*, which *Henry* the second had granted to his church by the name of *omnes decimas de Nova Foresta.* *Cart. Antiq. C. C.* in dors. 10. in arce *London.* In *Rot. pat.* 11 *H. 3.* m. 5. p. 1. *Eustace*, bishop of *London*, hath the tithe of the king's venison, taken in the forest of *Essex*, according to king *John's* grant, by writ directed unto the foresters and bailiffs of that county.

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Id. 446. *Mich.* 9 & 10 *H. 3.* *Rot.* 15. in arce *London*, in an attachment upon a prohibition by *John Fitz-Robert* against *Philip of Ardern*, clerk, in the pleading allows, that for tithe of hay and mills the prosecution in the spiritual court was lawful; but he further saith, that *de decimâ bestiâ forestæ eum implacitavit contra prohibitionem.* — 16 *H. 3.* m. 7. *Rot. pat.* the king sent his command to the constable of *Windsor* castle, that the church of *St. John* in *Windsor* should have *decimas gardini regis de Windleshores.*

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Id. 366, 367. *Rot. Parl.* 18 *E. 1.* in *Receptu Scaccarii*, *Ralph*, bishop of *Carlisle*, *petit versus ecclesiæ priorem de Karliel decimas dua-*

rum placearum terræ of the new assarts in the forest of *Inglewood*, whereof the one is called *Linthwait*, the other *Kirkthwait*, *quæ sunt infra limites parochiæ ecclesiæ suæ de Aspaterik, &c.* and lays by prescription in his predecessors the tithes of the pannage there, before the assarting or culture. *Henry* of *Burton* also, parson of *Thoresby*, claimed in parliament, the same tithes as belonging to his church, & *infra limites parochiæ suæ*. And the prior comes and says, that, *Henricus, rex vetus*, (*Henry* the first, it seems,) *concessit Deo et ecclesiæ suæ beatæ Mariæ Karliel omnes decimas de omnibus terris quas in culturam redigeret infra Forestam, et inde eos feoffavit per quoddam cornu eburneum quod dedit ecclesiæ suæ prædictæ, &c.* Whereupon the king's attorney dicit, *quòd decimæ prædictæ pertinent ad regem, et non ad alium, quia sunt infra bundas Forestæ de Inglewood, et quòd rex in Forestâ suâ prædictâ potest villas ædificare, ecclesias construere, terras assartare, et ecclesias illas cum decimis terrarum illarum pro voluntate suâ cuiusque voluerit conferre, eo quod Foresta illa non est infra limites alicujus parochiæ, &c.* Et petit quòd decimæ illæ domino regi remaneant, prout de jure debent ratione prædictâ, &c. Et quia dominus rex super præmissis vult certiorari, ut unicuique tribuatur quod suum est, *William* of *Vesci*, justice of the forest beyond *Trent*, and *Thomas* of *Normanvill*, his escheator for those parts, (for so was the division anciently of escheatorships,) were assigned commissioners to inquire of the truth, & certificent regem ad proximum parliamentum. So, as it appears, that the attorney challenged not the soil by prerogative, but only in regard that the place being the demesne land of the crown, and not assigned to any parish, the tithes are grantable by the king, as owner, at his pleasure. And so it well agrees with that liberty claimed by king *John* in the name of his baronage, that they might found new churches at their pleasure in their own sees, (before the establishment of parochial right in tithes), as also with the more ancient practice of this kingdom, whereby tithes might not be parochially exacted, nor were so reputed due, but by the owners arbitrarily conveyed in perpetual right.

Id. 368. *Mich.* 5 *E.* 3. *coram rege, Rot.* 168. in *Cumbria* it was adjudged in the king's bench, *quòd de decimis grossis priori de Carleol et predecessoribus suis de dominicis domini regis infra Forestam de Inglewood provenientibus, et extra quarumcunque parochiarum limites existentibus per cartam progenitorum domini regis nunc concessis, & per cartam ipsius D. R. nunc confirmatis, &c.* a prohibition should be granted against the bishop of *Carlisle*, that claimed them. It was upon a record sent thither out of the parliament, as in the roll appears largely.

Rot. Parl. 8 *E.* 2. *m.* 17. *in dorso.* *Edward* the first gave such tithes of the forest of *Dean* as increased not within any parish to

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the bishop of *Landaff*, by which title the bishop afterwards claimed them; and no question was of that point.

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Hil. 19 *Ja.* in the common pleas in the case of *Noyes* and *Crosse* it was resolved, that the king was discharged of payment of tithes in the forest of *Savernack* during the time that the forest was in the hands of the king; for that he was not bound by the council of *Lateran* which established the parochial right of tithes. And it was resolved also in that case, that the king might well enough prescribe *in non decimando*, and be discharged of the payment of tithes, which, as *Lindwood* saith, is only *negatio oneris*, insomuch as the king is *persona mixta, et sacro oleo unctus*, according to 33 *E. 3.* *Ayd de roy* 103, and hath the supreme ecclesiastical jurisdiction in him, and is the supreme ordinary that hath the cure of souls, as it appeareth by 5 *Rep.* 15. *Cawdrey's case*, 27 *E. 3.* 84. and *F. N. B.* 34. And, as *Lindwood* saith, the king of *England* hath a spiritual character imprinted in him; and as the bishop hath imposition of hands, so hath the king the sacred unction of oil, and is the fountain of all spiritual jurisdiction. It is to be observed too, that the king is the founder of all bishopricks, and the giver of all temporalities and jurisdiction. The bishop, who had the collecting of all manner of tithes before the council of *Lateran*, which established the parochial right, did not collect any thing of the king; and the king might have given his tithes to whom he would; and if he might give them, he might retain them. Besides the king, who had his chapel and his chaplains in his own family for the administering of the sacraments and the spiritual functions, and did maintain them, had not the same cause for the payment of the tithes of his demesnes, as others had. And *jus præstandi decimas* being, as *Lindwood* saith, *quædam servitus*, and therefore called *jugum decimarum*, it is not proper for the king, who is not subject unto the doing of any service, to perform this service, unless himself pleaseth.

Lastly, it is to be observed, that for any thing that appeareth, this forest is as ancient as the division of parishes, which was in the time of *Honorius A. D.* 630. and long before the council of *Lateran*, which established parochial right. And forests, which were only a receptacle for wild beasts, whereof no use was made but only for the recreation and pleasures of the kings of *England*, and in which, by the laws of the forest, there might not be any building of houses, nor tilling of ground, nor depasturing of sheep, were never upon the division of parishes annexed to any parish: for it was in vain to annex them, when there was nothing in them whereof to pay tithe.

Concilia Generalia Binii, *T. i. fo.* 208. *A. D.* 260. *Epistola Dionysii Papæ* 11. *ad Severum Episcopum.*—*Ecclesias vero singulas singulis presbyteris dedimus, parochias et cæmeteria eis divisimus, et uni-*

cuique jus proprium habere statuimus, ita videlicet ut nullus alterius parochiæ terras, terminos, aut jus invadat, sed unusquisque suis terminis sit contentus, et talitèr ecclesiam et plebem sibi commissam custodiat, ut ante tribunal æterni judicis ex omnibus sibi commissis rationem reddat, et non judicium, sed gloriam, pro suis actibus accipiat. Hanc quoque Normam, charissime, te, et omnes episcopos, sequi convenit; et quod tibi scribitur, omnibus, quibuscunque potueris, notum facias, ut non specialis, sed generalis fiat ista præceptio.

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Concilium Tridentinum Sessio 24. Bin. Concil. In iis quoque civitatibus ac locis ubi parochiales ecclesiæ certos non habent fines, nec earum rectores proprium populum, quem regant, sed promiscuè petentibus sacramenta administrant; mandat sancta synodus episcopis pro tutiori animarum eis commissarum salute, ut distincto populo in certas propriasque parochias unicuique suam perpetuam, peculiaremque parochiam assignent, qui eas cognoscere valeant, et a quo solo licitè sacramenta suscipiant, aut alio utiliori modo, prout loci qualitas exegerit, provideant. Idemque in iis civitatibus ac locis ubi nullæ sunt parochiales, quam primum fieri curent; non obstantibus quibuscunque privilegiis et consuetudinibus immemorabilibus.

Concilium Triburiense sub Formoso Papâ, A. D. 895. c. 13. Bin. Concil. T. iii. pars 2. De decimis quatuor enim fieri partes juxta canones judicamus, de decimis et oblationibus fidelium: ut una sit episcopi, altera clericorum, tertia pauperum, quarta restorationi ecclesiarum servetur, sicut in epistola Gelasii Papæ, cap. 27. legitur.

C. 14. Placuit huic sancto concilio, ut secundum sanctiones canonum decimæ, sicut et aliæ possessiones, antiquis conserventur ecclesiis, sicut in Chalcedonensi S. Concilio statutum est, cap. 17. Si quis autem in affinitate antiquæ ecclesiæ novalia rura excoluerit, decima exinde debita antiquæ reddatur ecclesiæ. Si verò in quâlibet silvâ vel deserto loco ultra milliaria quatuor aut quinque, vel eo amplius, aliquod dirutum conlaboraverit, et illic, consentiente episcopo, ecclesiam construxerit, et consecratam perpetraverit, prospiciat presbyterum ad servitium Dei idoneum et studiosum, et tunc demum novam decimam novæ reddat ecclesiæ, salvo tamen potestate episcopi.

Concilium Nannetense incerti temporis, c. 10. Bin. Concil. T. iii. p. 2. f. 191. Instruendi sunt presbyteri paritèrque admonendi, quatenus noverint decimas et oblationes, quas a fidelibus accipiunt, pauperum, et hospitum, et peregrinorum esse stipendia, et non quasi suis, sed quasi commendatis uli, de quibus omnibus sciant se rationem posituros in conspectu Dei; et nisi eas fidelitèr pauperibus et hiis qui præmissi sunt, administraverint, damna pessuros. Qualitèr vero dispensari debeant canones sancti instituunt, scilicet, ut quatuor partes inde fiant; una ad fabricam ecclesiæ relevandam; altera pauperibus distribuenda; tertia presbytero cum suis clericis habenda; quarta episcopo reservanda, ut quicquid exinde jusserit, prudenti consilio fiat.

Placed
by Binius
about the
end of the
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Concilium Romanum sub Johanne Papâ ix. *A. D.* 904. Binius *T. 3. p. 2. f. 13. c. 9.* *Ut omnis decimatio ab episcopis vel his qui ab eo substituti sunt præbeatur, nullusque eam ad suam capellam, nisi forte concessione episcopi, conferat. Quod si fecisse contigerit, primam legibus subjaceat humanis; postea excommunicatione populi constrictus; ad ultimum ipsa capella, quæ magis contentionem, quam utilitatem aliquam præstat, destruiatur. (a)*

Synodus Augustana *A. D.* 952. sub Joanne Papâ xii. celebrata, *c. 10.* Binius *T. 3. p. 2. f. 132.* *Ut omnis decimatio in potestate episcopi sit, et si neglecta fuerit, quicquid inde emendandum sit coram episcopo ejusve misso corrigatur.*

Concilium Lateranense sub Calixto Papâ ii. *A. D.* c. 18. Binius *T. 3. p. 2. f. 465.* *In parochialibus ecclesiis presbyteri per episcopos constituentur, qui eis respondeant de animarum curâ, et de iis quæ ad episcopum pertinent, decimas et ecclesias a laicis non suscipiant absque concessu et voluntate episcoporum, et si aliter præsumptum fuerit canonice ultioni subjaceant.*

Concilia varia sub Alexandro Papâ iii. Binius *T. 3. p. 2. f. 534. 537.* *Conciliabulum (b) Clarendonense, quo sexdecim capitula consuetudinum, ut vocabant, Anglicanorum æquitati et ecclesiasticæ immunitati repugnancia confirmata sunt A. D. 1164. Alexandri Papæ iii.*

Ecclesiæ de feudo domini regis non possunt in perpetuum dari absque assensu et concessione ipsius.— Hoc toleravit Papa.

Nullus qui de rege teneat in capite nec aliquis dominicorum ministrorum ejus, excommunicatur, nec terræ alicujus eorum sub interdicto ponantur, nisi prius dominus rex, si in terrâ fuerit, conveniatur, vel justitiâ ejus, si fuerit extra regnum, ut rectum de ipso faciat, et ita ut quod pertineat ad curiam regiam ibidem terminetur, et de eo quod spectabat ad ecclesiasticam curiam ad eundem mittatur, ut terminetur.— Hoc damnavit Papa.

Appendix Concilii Lateranensis tertii Œcumenici sub Alexandro iii. Papa, *A. D.* 1179 or 1180. Binius *T. 3. p. 2. f. 599. pars 13. c. 9.* *Statuimus ut monasteria ex suis prædiis nullo modo decimas solvere cogantur. Quia si legitime dandæ sunt, orphanis et peregrinis dandæ sunt. Indignum est enim ut a clericis exigantur, qui propter eam cuius sunt decimæ, pauperes efficiuntur. Nam si pauperes domini sunt, pauperum hæreditas pauperibus ejus eroganda est illis videlicet, qui propter amorem illius quæ poterant possidere dimittunt, eamque nudi sequentes potestati alterius se submitunt.*

(a) This and eleven other chapters which are assigned to this council, are, according to the testimony of *Baronius*, of some other council; but, saith he, ob venerandam antiquitatem digna sunt meo judicio quæ hoc loco edantur et sufficiantur.

(b) Stolen, clandestine meetings of the church, that is, assemblies not convened by the authority of the pope, were called *Conciliabula*. *Concil. Carthag. iv. can. 71. Conventicula hæreticorum, non Ecclesia, sed Conciliabula appellantur. De Fresne Gloss. voc. Conciliabulum.*

Pars 13. c. 16. f. 600. Novum exactionis genus est, ut clerici a clericis frugum vel animalium decimas exigant. Nunquam enim hoc in lege Domini præcipi legimus aut permitti: nec enim a Levitis Levitæ decimas extorsisse leguntur. Illi profectò solvere laborum suorum decimas debent, qui a clericis spiritualium ministeriorum labores accipiunt.

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Pars 50 et ult. c. 39. f. 648. Noveris ergo quod si de artificio, vel de negotiatione, aut etiam de agriculturâ, quam inter terminos parochiæ, in quâ moratur, exercet, vel hujusmodi aliis decimæ solvantur, æquum est, ut ecclesiæ illi reddantur in quâ ille qui reddit per totum anni circulum missam audit.

C. 40. Quòd si laicus aliquis è clericis sive conversis decimas de laboribus suis in tuâ diocesi requisiverit, te cum ab exactione hujusmodi prorsus compellas, et laicos illos qui à colonis tertiam vel quartam partem laborum suorum ante solutionem decimariam recipiunt, decimam de portione suâ secundum quod colonus de parte, quæ illum contingit, exsolvere consuevit, absque diminutione aliquâ his quibus debentur facias exhibere.

Pars 28. c. 3. f. 619. Statuimus, ut si super decimis inter vos et aliquam personam ecclesiasticam assensu episcopi vel archiepiscopi sui compositio facta fuerit, rata perpetuis temporibus et inconcussa persistat.

Canones Concilii Lateranensis Generalis sub Innocentio Papâ ii. celebrati. Binius *T. 3. p. 2. c. 10. f. 487. Decimas ecclesiarum, quas in usu pietatis concessas esse canonica demonstrat auctoritas, a laicis possideri apostolicâ auctoritate prohibemus. Sive enim ab episcopis, vel regibus, vel quibuscumque personis eas acceperint, nisi ecclesiæ reddiderint, sciant se sacrilegii crimen committere, et periculum æternæ damnationis incurrere. Præcipimus etiam ut laici qui ecclesias tenent, aut eas episcopis restituant, aut excommunicationi subiaceant. (a)*

(a) With this argument we must take our leave of Sir Henry Calthorpe: for his manuscripts afford us no further light on the present subject. His Reports end with *Tr. 10 Car.* inclusive, and he does not appear, to have made any special argument after *Hilary Term, 11 Car.* The interval between this last term and his death, which happened the first of August 1637, was, probably, for the most part, employed in preparing his very diffuse and laborious reading upon the statute of 21 *Ja. c. 2. of concealments*, which he did not live long enough to deliver.

Sir Henry was a member of the *Middle Temple*, and called to the bar, as he tells us himself, in *Hil. 12 Ja. A.D. 1614*, at the age of twenty-seven years, and after upwards of seven years standing. He must therefore have been born in the year 1587, and could not have been more than in the 50th or 51st year of his age at the time of his death. He came early into full practice. He was chosen recorder of *London*, upon the death of *Mason*, in January 1635, and

sat as recorder at the gaol-delivery in that month; but in three weeks afterwards he was knighted and removed, and made attorney of the court of wards and liveries, the first day of *Hilary Term*. [Sir *W. Jones*, 375. *Cro. Car.* 432.] He was that same year appointed solicitor to the queen; and called to the bench of the *Middle Temple*, and had chambers assigned to him. [*Lib. Parl. Soc. Med. Templ.*]

In the second volume of his Reports, Sir Henry mentions the death of his father, and thence takes occasion to give a short account of his family. The passage, though it has some quaintness in it, yet breathes so much filial piety, and shews a mind so deeply impressed with a sense of religion, that the reader, I trust, will not be displeased with the introduction of it in this place. "This same term (*Tr. 13 Ja.*) on the "15th day of June, about eight o'clock in the "morning, my very worthy and honoured father, "Sir James Calthorpe Knt. who had been sheriff "of the county of *Norfolk* the preceding year,

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[Here the argument of Sir Henry Calthorpe breaks off; the resolution of the court we have from Sir William Jones, who tells us, that the whole court, (absente Brampton) after several arguments at the bar, * held that this suggestion was not good. They agreed, that the king may prescribe in non decimando, because he is persona mixta; and that the council of Lateran does not bind him, unless he voluntarily submits to it. But they said, that this was a personal privilege which non egreditur personam, and the grantee shall not have advantage of

"and who was justice of the peace and quorum, and captain over certain hundreds in Norfolk, commended his soul into the hands of God, with whom I doubt not but that it still remains: for *qualis vita, finis ita*; and as he lived as a good man, so he died as a good man; and I may safely say of him, *quod pater obit, sed pietas vivit*: and therefore firmly believing that he is only *premissus*, not *amissus*, I leave him with the Creator and Redeemer of him and of all who believe, with whom I doubt not, but I shall hereafter see him, if I follow his steps; which God grant that I may do. He left behind him five sons and five daughters. Christopher Calthorpe, his eldest son, was married to Maud, one of the daughters and co-heiresses of John Thirton late of Brome, but now dead, by whom he has eight children now alive, and may have more, if it please God. The second son is myself, Henry Calthorpe. God give me grace to follow my profession in the fear of him, that I may not regard my own private lucre more than the safety of my soul, and the peace of a good conscience. The third son is Philip Calthorpe, married to Elizabeth Wade, the daughter and heiress of Wade, of in the county of Suffolk. The fourth son is Francis Calthorpe, who is now beyond sea. The fifth son is Nathaniel Calthorpe, who is now at Cambridge, and a scholar of Trinity College. The eldest daughter was Eleanor Calthorpe, married to Thos. Cotton Esq. the son of Bartholomew Cotton of Stanton Esq. who had issue seven children, four of whom are now alive, namely three sons and one daughter. The second daughter is Mary Calthorpe, who was married to Hammond Ward, of Clintigate, in the county of Norfolk, Gentleman, who had issue ten children, eight of whom are now living, namely, seven sons and one daughter. The third daughter is Anne Calthorpe, who was married to Sir Wm. De Grey Knt. of Merton, in the county of Norfolk, and had issue ten children, eight of whom are now living, namely, two sons and six daughters. The fourth daughter is Jane Calthorpe, who was married, first, to Sir Edmund Thimblethorpe, of Worstead in the county of Norfolk, Knt. by whom she had issue one daughter, and was afterwards married to Sir Edward Peyton, of Bradley in the county of Suffolk, Knt. who was son and heir of Sir John Peyton, of Ascham in the county of Cambridge, Knight and Baronet, by whom she had issue one daughter. My father left also my mother living, who was

"the daughter of Bacon, of in the county of Suffolk, Esq. He had likewise two sisters, Mary Calthorpe, married to one Mr. Goldwell, who died about a year before him; and Jane Calthorpe, who was married to Christopher Bell, the second son of Sir Bell, a Baron of the Exchequer."

It appears from Parkin's Continuation of Blome's History of Norfolk, vol. v. p. 792. that by an inquisition taken at Norwich, September 14th, 1637, our Reporter, Sir Henry Calthorpe, was found to die seized of the manors of Cockthorpe, Aldby, Blakeney, Wyveton, Acle, &c. in the county of Norfolk, and the manor of Aspton in Suffolk, on the first of August in that year, leaving by Dorothy, daughter and co-heir of Edward Humfrey Gent. James his son and heir, aged eleven years. This son James, we find, was afterwards married to Reynolds, daughter of Reynolds, and sister of Sir John Reynolds of Hampshire. He is said to have been knighted by Oliver Cromwell. He had three sons, James, Christopher, and Reynolds: James, the eldest, was lord of the manor of Cockthorpe in 1698, and one of the same name presented one Henry Calthorpe to the church of Cockthorpe 1743. The male line of Christopher, the eldest brother of Sir Henry, became extinct in Nov. 1720; and the estate passed through females into the family of Sir Henry L'Estrange, of Hanstanton, Knt.

It must be admitted, I think, from the specimens which have been given in the course of this work, that Sir Henry Calthorpe, as a Reporter, has considerable merit. His narrative is easy, and his manner unaffected. He states the facts of every case fully and particularly; delivers the arguments in an even tenour, and rarely suffers their progress to be interrupted by colloquial digression; a too common practice with some of his contemporaries. Although his care in examining, digesting, and arranging the matter is constantly observable, yet the freedom of oral delivery is never lost. The labour that is bestowed upon it never affects the naturalness of the story; we see what passed upon the occasion, represented, as it should seem, much as it passed, but purged of those impurities and incorrectnesses which mingle with hasty and inconsiderate relation. The points that were resolved by the court are carefully and distinctly stated, at the same time that the incidental observations which fell from the different judges are not withheld from our view. It seems to have been the Reporter's anxious wish to make each case complete within itself; that it might be understood without any extraneous help,

it; and that there was no difference between this case and that of *Sydown and Holmes*. † Whereupon a consultation was granted; and *Brampston* afterwards agreed to it.] 1636.

Earl of
Hertford
v.
Leech.
† Supra
479.

Hil. 14 Car. A. D. 1639. B. R.

Gibbs v. Wybourne. [Sir W. Jones 416.]

A MAN had a nursery for young plants, which he used to transplant, and to give or sell to others, who planted them *de novo* out of the parish in their own ground; and the parson of the parish where the land lay in which they were first planted, libelled in the ecclesiastical court for the tithe of the value of the plants so transplanted. A prohibition was granted; the plaintiff declared in it; a plea was put in; the plaintiff replied, and to the replication there was a demurrer, which was argued by *Maynard* for the defendant, and *Rolle* for the plaintiff. (a) The only point was, whether tithes should be paid in this case. *Per totam curiam*, they ought to be paid; and thereupon a consultation was awarded. (b)

Tithes are due of the value of plants sold out of a nursery to be planted in land out of the parish. Cro. Car. 526. S. C.

M. 15 Car. A. D. 1639. B. R.

Barfoot v. Norton. [Sir W. Jones 447.]

In a prohibition between *Barfoot v. Norton*, it was resolved *per totam curiam*, that tithes are to be paid for honey. (c) Tithes payable for honey. Cro. Car. 559. S. C. F. N. B. 51. G. — Croke says, that a consultation was awarded *nisi causa*, &c. It should seem from Cro. Car. 404. that tithes are not payable of the bees themselves.

and read without the interruption of reference. He therefore does not barely mention the cases and books that are adduced in support of the argument, but shews the point of the authority, and extracts the passages; nor does he decline the trouble of transcribing at length the clauses of a statute. The method of condensing the matter of several arguments, of throwing together into one mass what is advanced by different speakers upon the same side of the question, and so presenting the whole under one view; was, probably, little known in Sir Henry Calthorpe's time; it was too artificial for the simplicity of those days: but, though we read the arguments of the different counsel separately, and of course occasionally meet with the same topics, yet we have seldom to complain of an irksome repetition: the recurrence of the same topics is not always tautology: though an argument may be substantially the same, yet its effect will vary with the light in which it is placed, and the incidents which accompany it. Upon the whole, we cannot withhold from Sir Henry Calthorpe the praise of diligence, accuracy, and perspicuity; nor can we deny, but that his

reports and arguments, edited under the care of so able an expositor and so profound a lawyer as their present possessor, Mr. Hargrave, would be a most valuable addition to our juridical collections.

(a) *Rolle* argued that the plants were of the nature of the land, and tithes shall not be paid of them no more than of mines of coal or stone digged, or for trees or wood spent in hedging, or fuel in the house wherein husbandry is maintained.

Maynard argued, that forasmuch as he made profit by such young trees, it is reason tithes should be paid for them when he digs them up and sells them in another parish, as well as of corn or carrot roots or such things. Cro. Car. 526.

(b) See *Grant v. Hedding*, Hard. 380. *infra*, 515. *Adams v. Waller*, *infra*, 1214. 1 *Rolle's Abr.* 637. pl. 6., but this pl. was objected to in *Adams v. Waller*, by counsel *arguendo*.

(c) *Ged. Rep.* Can. 389. As to the mode of tithing honey, see the same. *ibid.* and 1 *Rolle's Abr.* 635. *Degge's P. C.* part ii. c. 7.

1648.

Banister
v.*Wright.*

Tithes of
extra paro-
chial lands,
and lands
lying in a
forest.

M. 24 Car. A.D. 1648. B. R.

Banister v. Wright. [Style 137.]

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IN a trial at bar between *Banister and Wright*, in an action upon the statute of 2 & 3 E. 6. for not setting forth tithes, it was said by the court, that tithes, which lie not within any parish, are due to the king, and that lands must be parcel of a parish, either by prescription, or by act of parliament; and that lands lying within a forest, and in the hands of the king, do not pay tithes, although they be within a parish; but, if the lands be disafforested, and be within a parish, they ought to pay tithes; for their not paying tithes, being in the king's hands, is but an immunity for that time only.

Hil. 6 & 7 Car. II. A.D. 1655. Scac.

Guilbert v. Eversly. [Hardr. 35.]

Tithes pay-
able for
herbage
eaten by the
mouths of
travellers'
horses.

THE plaintiff preferred an *English* bill in the exchequer chamber, for tithes of herbage, as vicar of *Ealing* in *Surry*, against an inn-keeper who depastured travelling horses, for which there was no customary payment; and the value of the lands depastured were proved to be thirty pounds a year. The court were in doubt what decree to make for a certain rate to the parson, it not being ascertained by custom: and they conceived, that they ought to have regard to the value of the land, which is proved to be thirty pounds a year, and so to allow him two shillings in the pound. (a) But, they agreed clearly, that tithes were payable for such herbage eaten by the mouths of travellers' horses, as aforesaid; and they held that tithe shall be paid for agistment of cattle by the occupier of the land. (b): but they said, they would award a commission to inquire into the value of these tithes, *unless the parties agreed in the mean time*, which they advised.

Tithe for
agistment
of cattle
payable by
the occu-
pier of the
land.

P. 9 Car. II. A.D. 1657. Scac.

Staveley v. Ullithorn. [Hardr. 101.]

The coun-
cil of *Late-
ram*, a ge-
neral law
received in
England;
and lands

IN an action upon the case in a feigned action, upon a bill in equity, and an order for a trial at law, the question was, whether certain lands were discharged of tithes, as having belonged to the abbey of *Fountaines* in *Yorkshire*, which was of the *Cistercian* order; and it was held, *by the court* clearly, that the council of

(a) Qu. See *Smith v. Roocloff*, Bun. 20.
Startup v. Dodderidge, *infra*, 587.,
extending to such money payments for tithes in

general. *Contra*, see *Simpson v. Tucker*, 1 Wood,
197. *Devereux v. Radley*, *ibid.* 66.

(b) Degge P.C. part ii. c. 5. *Watson's C.L.*
465.

Lateran, which freed that order from payment of tithes, was a general law received in *England*; and if these lands were discharged of tithes, from the time of that council, that no other covenant or contract made by the abbot to pay tithes, could dispense with this privilege, or make them liable to tithes; for once discharged by that council, always discharged; for the council is as forcible as an act of parliament, which concludes all parties.

And the court was also of opinion, that if there were any such agreement for payment of tithes, before the council, that yet this council, as a general law, which includes all men's consent, had dissolved it, and the lands were discharged.

were. Wood's Exchequer Decr. vol. i. 24. S.C.

1657.

Stavely
v.
Ullithorn.

discharged
of tithes by
that coun-
cil are dis-
charged by

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law, as all
lands be-
longing to
the Cister-
tian order
[Giles, 411.

P. 9 Car. II. A. D. 1657. Scac.

Sheffield v. Serjeant. [Hardr. 102.]

UPON a bill in equity, to be relieved for customary tithes in *London*, the case was, that the plaintiff's title was under a sequestration by parliament, and an order thereupon by the committee for plundered ministers; and the question was, whether he was relievable according to the decree confirmed by statute 37 H. 8. chap. 12. concerning tithes in *London*, by which the mayor of *London* must be first addressed to; and the decree mentions only the parson, vicar, and curate; and whether, he that is in by sequestration be within it, not being parson *de jure*, was the question. And it was urged by the defendant's counsel, that he is relievable there, and therefore not here, because he comes in under the parson's title, and as his lessee. The same law is of an impropiator, who is not within the words of the decree; and that so it was lately ruled in *Chancery*, which the court agreed to, but yet were divided in this case; and it was afterwards, by consent, referred to compromise.

The court
was divided
in opinion,
whether he
that is in
by seques-
tration, be
relievable
for custo-
mary tithes
in *London*,
according
to the de-
cree con-
firmed by
the statute
of 37 H. 8.
c. 12.

M. 9 Car. II. A. D. 1657.

Sheffield, clerk, v. *Pierce* and others. [Decree Book, 12th Nov. 1 Wood. 38.]

THE bill stated, that by the judgement of the late parliament of *England*, assembled at *Westminster*, on the 3d of *November* 1640, the rectory of *St. Swithin's* in *London*, stood sequestered from *Richard Owen* to the use of *A. Menius*, an orthodox divine; and that, he relinquishing the same in the year 1647, it was, by the same parliament, in the same year, afterwards ordered, that the same rectory should thenceforth stand sequestered to the use of the plaintiff, and that he should officiate the same, and have to his use the parsonage-house, glebe-lands, and all the tithes, rents, duties,

Plea of the
statute
37 H. 8.
c. 12. § 19.
respecting
tithes in the
city of
London, to
a bill in
equity for
the tithes of
the parish
of *St. Swith-
in's*, over-
ruled.

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clerk,v.
Pierce
and others.

* [504]

and profits whatsoever of the said rectory to his own use, till further order should be taken in the premises; that by virtue of the said order of parliament he entered, and officiated in the cure, and *performed his duty therein in all things, and ought to have had the tithes, offerings, profits, and commodities, of what kind soever, belonging to the same as rector and parson there, as the former ones had heretofore had and received and enjoyed the same. The bill then set forth the statute and the decree, confirmed by act of parliament in the 37th year of *H. 8.* touching the payments of tithes by the citizens of *London* after the rates of every 10s. a year rent 1s. 4½d. and for every 20s. the sum of 2s. 9d. and so on; and that the greatest part of his parishioners have and still do continue payment of all kind of tithes, offerings, duties, and profits to the plaintiff, or some recompence for the same; but the defendants have for five years refused the payment of the same. The plaintiff therefore prayed, that the defendants may make a full discovery of the messuages, &c. they held for the same years, and the yearly rent, and that the tithes and duties due for the same may be decreed to him accordingly.

The defendants put in a plea and demurrer, setting forth, that the plaintiff entitles himself to the tithes in question by an order of the late parliament begun and held at *Westminster* in 1640, but makes his title by act of parliament made in the 37th year of *H. 8.* and of a decree made thereupon; and that it was doubtful whether the plaintiff, coming in by sequestration, be relievable before the mayor of the said city of *London*; and therefore the said defendants for plea say, that the said act of parliament and decree do only provide for the recovery of tithes in *London*; and that in and by the said decree it is decreed, "that if any variance, controversy, or "strife, did or should arise in the said city for any payment of "tithes, then, upon the complaint by the party grieved to the mayor "of the said city, he shall, by advice of counsel, call the parties before him, and make an end of the same; and if he should "not within two months after the complaint, the lord chancellor of "England, within three months after complaint made to him, "should make an end of it;" that the said plaintiff ought to have pursued the way directed by the said decree; and that if the plaintiff be not relievable within the said decree by the said lord mayor of *London* and lords commissioners of the great seal of *England*, as he said by his said bill he is, much less could this court take cognizance or jurisdiction of a case of this nature whereby to relieve the said plaintiff.

Upon reading the plea, and hearing counsel on both sides, on the 24th of *November* 1655,

It was ordered by the court, that the said plea and demurrer should be over-ruled, and that the said defendants should answer the said bill.

The defendants answered, and denied that they knew that the plaintiff was ordered to officiate the cure of the said parish as rector there and have the profits, or that he had officiated there; and that if he had any title thereto, they did not conceive him to be entitled to 2s. 9d. in the pound for his tithes according to the rents they then paid for their houses, it not being the intent of the said statute and decree to pay tithes according to the improved rents, but according to the old rents as they were before the said statute; they confessed that they were inhabitants, and set forth the houses, &c. and the rents they paid for the same; and that when the said plaintiff first came to officiate there, he agreed to accept of 120*l.* *per annum* with some of the parishioners in lieu of tithes and duties there, which had been constantly paid to him.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides.

Now, upon full hearing and full debate, and reading the proofs in the cause, and the said order of parliament begun and held at *Westminster* aforesaid, on the third of *November* 1640, bearing date the 30th of *December* 1647, it appeareth to the court, that it was ordered that the said rectory of *St. Swithin* should thenceforth stand sequestered to the use of the said plaintiff, and he to officiate the same, and to have all the tithes, duties, and profits whatsoever of the said rectory to his own use; and also it appeareth, that the said plaintiff, by virtue of the said order of parliament, did ever since officiate the said cure, and perform his duty therein in all things, and therefore ought to have had the tithes, offerings, profits, and commodities, of what kind soever, belonging to the said rectory, as rector and parson there, as the former ones there theretofore had had and received the same; and that the said defendants had not paid the tithes due to the plaintiff for the several years complained of in the bill to be behind and unpaid.

And as for *the composition*, pretended to be made between the said parishioners and the said plaintiff, to accept of 120*l.* *per annum* in lieu and satisfaction of all tithes and duties due and payable to him within the said parish, it appeareth to this court, that the said composition was to continue for the space of three years next after the said plaintiff's coming to officiate there, and no longer; and there not being sufficient proof made on the said defendant's behalf that the said sum of 120*l.* was paid to the said plaintiff any longer than

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clerk,

v.

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and others.

The rate ordered by the statute 37 H. 8. c. 12. § 2. to be paid on the rent of houses in London in lieu of tithes, is assessable on the improved rents of such houses.

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The court is therefore fully satisfied, for the reasons before alleged, that the defendants ought to have satisfied and paid their

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clerk,
v.
Pierce
and others.

several and respective tithes, due and payable by them, to the said plaintiff for the years aforesaid complained of by the bill, according to the rate of 2s. 9d. in the pound for their several houses, shops, warehouses, cellars, and sollars, which they held within the said parish, according to the several yearly rents which they severally and respectively pay for the same (a): yet nevertheless in regard the said plaintiff, being present in court, did declare himself willing to accept the several sums heretofore paid by the said defendants, and mentioned in the decree for their several houses, &c. for tithes, in full satisfaction of all tithes due and payable to the plaintiff by the said defendants; and that the said defendants shall continue the payment of the same as long as he continues rector thereof, and they continue inhabitants within the said parish; and if any differences arise between the said parties touching the payment of the tithes according to the several rates and proportions in the decree mentioned, it is referred to the auditor of his highness's revenue within the city of *London* to cast up the same upon view and perusal of the said pleadings, and certify to this court his doings and proceedings therein with all convenient speed; and that upon return of the said certificate the said defendants shall thenceforth satisfy and pay to the said plaintiff all such sums of money as shall be certified by him to be due to the plaintiff. And it is ordered, that the said defendants shall satisfy and pay to the said plaintiff 10*l.* for his costs and charges by him sustained in the said cause.

M. 9 Car. II. A. D. 1657. Scac.

Coe, clerk, v. Mason. [Decree Book, 26th Nov. 1 Wood. 41.]

An endowment that the vicar of *Branghinge* in *Hertfordshire*, shall "wholly receive and fully possess all obventions of the altar, with the tithes, and the vicarage-house, and all the land

THE plaintiff, as vicar of the parish church of *Branghinge*, exhibited a bill, setting forth, that he, on the first of *June* 1648, by an order of the committee for *plundered ministers* appointed by authority of parliament, was nominated and appointed to officiate the cure of *Branghinge* (being at that time under sequestration for the delinquency of *William Archer* incumbent,) and to hold and enjoy the vicarage-house and the glebe-lands, and also to take, receive, and enjoy, all and singular the tithes, benefits, and profits thereof, as had been before received by his predecessors; and that he had fully performed the cure, whereby he was entitled to have and receive all manner of small tithes; that from time whereof the memory of man is not to the contrary, or otherwise, by some *ancient endowment*, the vicar of the said parish church, for the time being, hath received and taken, and is entitled to take, receive, and enjoy,

(a) *Ivatt v. Warren*, *infra*, 1054. *Sayer v. Paul v. The Dean*, 4 Pri. 65. *infra*, vol. ii. *The Mumford*, *infra*, 546. *Kynaston v. Willoughby*, *Minor Canons of St. Paul v. Crickett*, 5 Pri. 14. *infra*, 891. n. *Warden and Minor Canons of St.* *infra*, vol. ii.

all and singular the tithes of hay, hops, lamb, wool, and woods, and all and singular the minute and privy tithes yearly from time to time coming and growing, &c. within the said parish and titheable places thereof, which had always been paid in kind; that the defendant, for divers years past, had been an inhabitant therein, and for two years was occupier or possessor of divers lands, meadow and pasture, parcel of and belonging to the manor of *Branghbury* and the titheable places thereof, and planted hops, and cut down wood, and kept and depastured upon the said grounds sheep, from which he had lambs, and sheared the same, and had wool, and also cut down grass, and made the same into hay; the tithes of all which amounted to a large sum; all which tithes are due to the said plaintiff, and ought to have been paid *in kind*, or some composition made to him for the same; which the said defendant detained from him, and refused the said tithes. He therefore prayed a discovery of his said tithes, and the values thereof, and an account and satisfaction for the same.

The defendant by his answer said, that it may be true, but that he knew not, that the plaintiff was appointed to officiate the cure of the said parish; that he believed the plaintiff for eight years past might have officiated the cure there, and have a right to all tithes formerly of right paid to the vicar; but he denied that time out of mind, or by ancient endowment, the vicar ought to have all tithes of hay, hops, and wood, and all minute tithes. The answer also stated, that for three years past he, the defendant, had inhabited in the said parish, and been farmer of lands there, parcel of the said manor; and he set forth his titheable matters, and the values thereof, and that he had paid no tithe at all to the plaintiff, conceiving there was none due to him, for that all the lands he occupied were and are *demesne lands* of the said manor, which were parcel of the possessions of the priory and canons of the *Holy Trinity* in *London*; that the church of *Branghinge* was long since appropriated to the priory and canons, and confirmed to them by the bishop of *London*, being bishop of that diocese; and that by an endowment made in the year 1218 it appears, that the vicar of *Branghinge*, in the name of the vicarage, "should wholly receive and fully possess
" all obventions of the altar, with the tithes and the vicarage-house,
" and all the land to the said church then belonging (except the
" croft called *Valdebery*, and except the tenants and their tenements
" which in the portion or dividend of the canons should remain;)" that, by virtue of the said endowment, the vicar there never could claim to have any small tithes of the tenants and occupiers of the said lands which the defendant holdeth within the said parish, the same being excepted from payment of any minute tithes to the vicar by the same endowment, the said lands, and also the minute tithes,

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v.
Mason.

to the said church, except *Valdebery* and the tenements in the possession of the canons of the *Holy Trinity* in *London*," entitles him to all small tithes arising in the parish.

1657. being the portion or dividend of the said canons; that he never heard that any minute tithes, or any tithes at all, were ever paid or given to any of the vicars of *Branghinge* for any of the lands in his occupation; neither doth he conceive, that the said vicar hath any right or title to the same, either by prescription, endowment, or otherwise; that about thirty years since the owners or occupiers of *Brangherry*, whereof the lands in the defendant's occupation are parcel, did, for some years, give to the vicars thereof for the time being *five marks* a year by way of gratuity, though the vicars pretended it an ancient payment in lieu of small tithes; and therefore insisted on his right to refuse to pay tithes.

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v.
Mason.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides.

Copy of an
endowment
read, ex-
plaining the
right of the
vicarage
tithes.

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The cause came on this day se'nnight; and upon opening the pleadings, and reading a copy of an endowment extracted out of the principal registry of the late bishop of *London*, dated at *Fulham*, in the year 1218 (a), and proved to be a true copy, which seemed to explain the right of the vicarage tithes in question: the court took time to consider of the same; whereupon the barons being attended with copies, the cause came on to be further heard this day; and upon full and deliberate hearing,

The court's
opinion.

And upon long debate of the matters in question, and touching the meaning of the said endowment; and upon reading the several depositions for the plaintiff touching the payment of the tithes in question to the vicar of *Branghinge* for the time being; *Forasmuch* as it appeareth to the court, by the depositions of several witnesses, that the small tithes of hay, hops, wool, and other small tithes, have been paid in kind, or by composition, to the plaintiff, as vicar of *Branghinge*, and to his predecessors vicars there; and for that it is also proved by the plaintiff that the said defendant for the said years

(a) The endowment, which I have extracted from the register in the registry of the diocese of *London*, is as follows: "Omnibus sancte matris ecclesie filiis ad quos pervenit scriptum pervenerit Willielmus Dei gratia London episcopus salutem in Domino sempiternam. Cum venerabilis in Christo pater Cardinalis tituli sancti Martini presbiter cardinalis apostolica sedis legatus auctoritate legationis sue dilectis in Christo filiis priori et canonicis sancte Trinitatis London ecclesiam de *Branghing*, que ratione patronatus ad eodem canonicos pertinebat, ob devotionem et obedientiam, quam in perturbatione regni Anglie sancte Romane ecclesie impenderunt, pia consideratione contulerit, et carta sua, quam insperamus, confirmavit: Nos attendentes eorundem canonicorum conversationis honestatem, et religionis fervorem, eandem ipsi ecclesiam cum omnibus ad eam pertinentibus intuitu pietatis concessimus, et episcopali auctoritate in usus proprios confirmavimus eis et ecclesie sue perpetuo

possidendam. Saluti perpetui vicarii presbitero vicario nobis et successoribus nostris ab eisdem canonicis presentando, et residentiam ibidem facturo cum socio idoneo capellano. Qui quidem vicarius, nomine vicarie, omnes obventiones altaris cum minutis decimis, et managio, et tota terra ad eandem ecclesiam tunc pertinet (excepta crofta illa, que vocatur *Kaldecree*, jacente a parte Australi managii prelatiati, et exceptis tenentibus et eorum tenementis que in portione canonicorum remanebunt) integre percipiet et plenarie possidebit, et omnia onera episcopalia et archidiaconalia ad ipsam ecclesiam spectantia consueta et debita sustinebit. Et ne futuro tempore possit hac nostra concessio aut confirmatio occasione quolibet irritari, hoc scriptum sigilli nostri munimine duximus roborandum. His testibus, &c. Dat. apud *Fulham* anno Domini millesimo ducentesimo octavo decimo, Sextodecimo cal. Maii pontificatus nostri anno nonodecimo." *Fitz-Jam. 58. Stokesly, 110.*

had the aforesaid tithes of hops, wood, hay, wool, and lambs, the tithes of all which amounted to 7*l.* 4*s.* 8*d.*; and the court being of opinion, that by the said endowment the said plaintiff is entitled to all the small tithes arising within the said parish; it is thereupon finally ordered, adjudged, and decreed by this court, that the said defendant shall forthwith pay unto the said plaintiff, or to his assigns, the said sum of 7*l.* 4*s.* 8*d.* for the value of the said tithes by him detained from the said plaintiff. (a)

1657.

Coe, clerk,
v.
Mason.

M. 9 Car. II. A. D. 1657. Scac.

Hele and others v. Pronte. [Decree Book, 16th Nov. 1 Wood. 45.]

THE bill stated that the plaintiffs, ever since the 25th of *March*, in the year 1653, had been lawful owners of the rectory impropriate of *North Petherwin*, in *Devonshire*, with all tithes and profits thereunto belonging; that, time out of mind, all the tithes of corn and grain growing therein, and the titheable places thereof, had been always paid to the rectors and owners thereof in kind, or a composition for the same; and that the defendant had been *yearly owner of 20 acres of arable land within the said rectory, and yearly mowed wheat, barley, oats, and other grain, and carried the same away without setting out the tithe thereof regularly. The bill therefore prayed a discovery of the quantity and the value, and that the defendant might be decreed to pay the same.

A bill in equity lies to be relieved against the subtraction of predial tithes, notwithstanding the statute 2 & 3 E. 6. c. 13. gives an action at law.

*[510]

The defendant appeared, and put in a *demurrer* and answer.

And for *demurrer* he set forth, that between the 25th of *March*, 1653 and the 25th of *December*, in the said bill mentioned, he was owner of 20 acres of arable land within the said rectory, sown with wheat, barley, oats, and other grain, and yearly mowed the same, and converted the same to his own use, and that the tithes thereof yearly were worth 5*l.* but that he is advised that the subtraction of predial tithes by the not setting out of the tithe from the nine parts, and the unequal division thereof, are matters which may be relieved at law upon the statute 2 & 3 E. 6. c. 13. and therefore the plaintiffs ought not to prosecute any suit in equity for the same; the said plaintiffs not having set forth any certain title to the tithes, or shewed how long since their estate therein might commence since the subtraction of the said tithes. The defendant also set forth the titheable matters, and denied any fraud in setting out tithes.

(a) On the construction of endowments. See *infra*, 1258. *Byam v. Booth*, 2 Pri. 260. *infra*, *Devie v. Lord Brownlow*, *infra*, 1128. *Fynes* vol. ii. *Fox v. Bardwell*, Bun. 327. *infra*, 716. *v. Ordayno*, *infra*, 1668. *Oglander v. Lord Cunliffe v. Taylor*, 2 Pri. 329. *infra*, vol. ii.; and see Ellis on the pleadings in Suits for Tithes, p. 18. *et seq.* where the cases are collected.

1657.

Hale
and others
v.
Fronte.

The plaintiffs replied to the answer; the defendant rejoined; and witnesses were examined on both sides.

And upon opening the pleadings, and reading the evidence, and upon full debate,

It is ordered by the court, that the defendant shall pay to the plaintiff 7s. 6d. proved to be due and detained for tithes complained of by the said bill, and shall at all times hereafter duly tithe and set forth the tithe of corn and grain arising, &c. in the said parish and titheable places thereof by itself, so that the said plaintiffs or their servants may for the future take and carry away the same without any trouble or denial from the said defendant, or any claiming by or under him.

[511]

Tr. 10 Car. II A. D. 1658. Scac.

Langham v. Baker and others, parishioners of *St. Helen's, London.*

[Hardr. 116.]

An English bill lies in the exchequer, for non-payment of tithes in London, according to the decree in st. 37 H. 8. c. 12. Hardr. 116. pl. 1.

THE plaintiff, as farmer of the impropriate rectory of the said church, prefers his bill here against the defendants for not paying their tithes in *London*, according to the decree in statute 37 H. 8. c. 12. to which the defendants plead the said decree, and that the plaintiff hath his remedy before the mayor of *London*, by the act of parliament, which settles the decree; and demand judgement, whether or no this court will take cognizance of the matter?

And it was held clearly, that the court had jurisdiction in this cause; for that it appears by the very decree itself, and the act of 37 H. 8. and by *Lindwood de decimis*, that tithes were payable in *London* before the said act, for houses; but the *quota* was doubtful, which is remedied by the said act and decree; and the act has no negative words; it is not said, "before the mayor of *London*, and not elsewhere." See *Scudamore's* case, cited 2 *Inst.* 659. *Co. Mag. Chart.* upon 2 *E.* 6. and tithes were determinable here *ab antiquo*, as appears by 98 *Ass. Selden de decimis* (a), 4 *E.* 4. and by *Articuli Cleri*, c. 4. In the case of the king and his farmers, the cause follows the person, and his privilege; and this case is not to be resembled to cases where justices of peace are empowered by act of parliament; and for that cause justices of *oyer* and *terminer* have nothing to do, nor justices of gaol-delivery; and so *vice versa*, 11 *Rep.* Doctor *Forster's* case; for they have but a limited jurisdiction; and the king's farmer has, in respect of the revenue, the same personal privilege that the king has; and, without question, the king may sue here; and it was ruled, that the defendants *answer over*.

Supra 228.

Tr. 10 Car. II. A.D. 1658. Scac.

Button v. Honey. [Hardr. 190.]

IN an *English* bill for vicarage tithes, in some towns in *Kent*, the plaintiff did not set forth in his bill, how they became due to him, whether by prescription or endowment, as he ought to have done; and exception was taken to this at the hearing, after answer and depositions: and the exception over-ruled, because the defendant does by his answer admit him to be vicar, and that the tithes in question are his due; but insists only upon payment and satisfaction. *Which note*: for it has often been ruled contrary, it being the ground and foundation of the plaintiff's bill: but the bill was afterwards dismissed upon the merits, with 40s. costs.

1658.

*Button
v.
Honey.*

In an *English* bill for vicarage tithes, plaintiff need not [512] set forth how they became due to him, whether by prescription or endowment. *Vide infra.*

Tr. 10 Car. II. A. D. 1658. Scac.

Doble v. Potman. [Hardr. 160.]

UPON a cross bill against a parson to discover what sort of tithes in particular he claims to be due to him; for that the parson in his bill one while demanded one manner of tithing, and another time, another; the court held, that in such a cross bill, the plaintiffs need not entitle themselves to the jurisdiction of the court, because the cross bill is grounded upon another bill here in court; as, if a man be sued here in the office of pleas, he may have an *English* bill to be relieved against the plaintiff, without setting forth matter of jurisdiction. (a)

In a cross bill, the plaintiffs need not entitle themselves to the jurisdiction of the court.

M. 10 Car. II. A.D. 1658. Scac.

Langham v. Sparstowe and others, parishioners of *St. Helen's, London.*
[Hardr. 190.]

To an *English* bill for tithes of certain houses in *London*, according to the act of 37 H. 8. c. 12. and to have a discovery of the improvements of rent; the defendants, in their answers, set forth a customary payment in lieu of all tithes; and exception was taken to their answers, because they did not discover their rents (b), but relied upon their answer *de modo decimandi*. And the court held that the *modus* being alleged no otherwise than by way of answer, they ought likewise to have set forth the particulars of

If a *modus decimandi* be alleged no otherwise than by way of answer to an *English* bill for tithes, the defendants must an-

(a) On cross bills in suit for tithes. See *Coventry v. Burslem*, *infra*, 1596. *Howell v. Franklin*, *infra*, 1348. *Wake v. Conyers*, 1 Eden. 334. *Gordon v. Simpkinson*, 11 Ves. 509. *infra*, vol. ii.; and Ellis on the pleadings in Suits for Tithes, p. 32. *et seq.*

(b) The answer, as stated in the decree-book, was in this respect as follows: "And all the said

"defendants did severally and respectively set forth by their said answers the particular rents of their houses, which they alleged to have been their ancient rents." An issue on the custom was directed to be tried at bar by a jury of the county of *Kent*, but the event of that trial I have not been able to discover.

1658. their rents, and answered to all parts of the bill; but, if the defendants had pleaded it, they need not have answered to any other matter. And so it was ruled, though objected, that if the proofs were against them upon the *modus*, they might then answer upon interrogatories, to the particulars.

answer to all
[513]
other parts
of the bill;
but, if he
pleads it,
answer to any other matter. Vide infra 628. Gumley v. Fontleroy, contra, as to this point.

M. 12 Car. II. A. D. 1660. Scac.

Phillips v. Kettle. [Hardr. 173.]

In a declaration on the statute of 2 & 3 E. 6. the plaintiff need not show how entitled, though he claims tithes of lands in another parish.

IN debt upon the statute of 2 & 3 E. 6. the plaintiff declared, that he was rector of *St. Martin's All Saints*, and that by reason thereof he ought to have the tithes of 100 acres of land in the said parish of *St. Martin's All Saints*, and the tithes of 80 acres of land in the parish of *St. Martin's Genavesee*, without shewing how he became entitled to the lands out of his parish. This was holden by the court to be well enough after verdict: besides that, a general allegation without shewing a title, is well enough in this action.

P. 13 Car. II. A. D. 1661. Scac.

Cage v. Warner and another. [Hardr. 182.]

Defendants must answer an incumbent's bill for discovery of tithes illegally seized, with all the particulars and values.

THE bill charged, that the plaintiff in the month of *May* 1658, became incumbent of the church of *Bearested* in *Kent*; and that the defendants in *June* 1658 and 1659, by colour of an order of sequestration, made by the committee, in the county of *Southampton*, as they pretended, had seized divers tithes of divers parishioners; within the plaintiff's parish, due to the plaintiff; and to discover the particulars of the tithes so taken, and their values, and to have them paid to the plaintiff, was the scope of the bill; to which the defendant demurred, because it is a matter determinable at law, and a criminal matter; but the court put the defendants to their answer, *because it is matter of discovery.*

T. 18 Car. II. A. D. 1661. Scac.

Devereaux v. Radley. [1 Wood. 66.]

The vicar of Canewdown in Essex, claims by custom 3s. 6d. in the pound on the rent of certain marsh lands in lieu of the tithe of the herbage of the said lands.

THE bill set forth, that, for two years past, the plaintiff hath been vicar of the vicarage of *Canewdown*, in the county of *Essex*, and entitled to have and receive tithe of *herbage* and all other *small tithes* of what kind soever growing, &c. within the said parish or the bounds and precincts thereof, or to have other customary duties in lieu of tithes by prescription, custom, or endowment: that the defendant for five years past had been the farmer of a marsh and pasture ground there, containing seven hundred acres, and had fed thereon great stores of cattle; that he withholds from the plaintiff the tithes and customary dues for the said cattle, and all other

tithes; that every farmer of lands, when depastured with cattle within the said parish, have used to pay to the vicar there three shillings and sixpence in the pound for every pound the lands are rated at in lieu of tithe herbage, or some satisfaction for the same; that the defendant, being occupier of the said marsh for two years past at the rent of 210*l.* a year, did depasture thereon divers cattle for which there is due yearly to the plaintiff three shillings and sixpence in the pound, which the defendant refused to pay, and therefore he prayed a discovery and satisfaction for the same.

1661.

Devereaux
v.
Radley.

The defendant confesses, that he holds lands which lie part in *Caneardown*, and part in the parishes of *Althorne* and *Crivey*, at the yearly rent of 220*l.* and that the land lying in *Caneardown* is yearly worth 200*l.* a year; that he hath rented the same for twenty-four years past, during all which time he hath usually paid to the vicar thereof twelve-pence in the pound for every yearly pound rent; and that he usually paid the vicar yearly eleven pounds and no more, being twenty shillings more than the twelve-pence in the pound, which was always received by the former vicars; and that the usual payment for marsh land which was grazed was no more, and which he was willing to pay; and he set forth the number of cattle he fed thereon.

Defendant
says that
the usage
has been to
pay only 1*s.*
in the
pound.

The plaintiff replied, and witnesses were examined on both sides upon opening the pleadings, and reading the depositions of several witnesses in the said cause.

For that it appeared that the pastures, whereof the tithe herbage is demanded during one year and a half, were wholly depastured with barren cattle, and such as yielded no titheable profit; and consequently of common right tithe herbage is due for the same; and forasmuch as it appeared that the said pastures are and have been usually let for 200*l. per annum*, and consequently in an ordinary estimate the tithe herbage of the pastures aforesaid being so employed as aforesaid amounts yearly to twenty pounds, viz. two shillings for every twenty shillings; and according to such rate the tithe herbage hath been usually rated and paid in the said parish, when the pastures or marshes have been so fed and depastured.

It is ordered by the court that the defendant shall pay to the plaintiff thirty pounds in lieu of tithe herbage for the said marsh or pasture grounds held by him within the said parish for one year and a half, which is according to the rate of two shillings in the pound by the year, for every pound rent the said lands are rented at, the same being rented at 200*l. per annum.* (a)

Defendant
ordered to
pay 2*s.* in
the pound.

(a) See *Holbeech v. Taylor*, 1 Wood, 66. *Taylor v. Coles*, 4 Wood, 45. n. *Simpson v. Tucker*, 1 Wood, 197. *Bull v. Till*, 2 Wood, 175. *Strode v. Bickham*, 1 Wood, 269. cases where customary payments by way of poundage have been allowed.

1662.

H. 15 Car. II. A.D. 1662. Scac.

*Page's Case,**Page's Case.* [Hardr. 322.]

Defendant set forth in his answer, that the lands where tithes were demanded, were parcel of a priory,

IN a bill for tithes, the defendant, by his answer set forth, that the lands whereof tithes were demanded, were parcel of the priory of _____ and that the lands belonging to that priory were discharged by order, without saying more, and this was held sufficient: *which note*, because of the uncertainty. which was discharged by order, without more, and held good.

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H. 14 & 15 Car. II. A.D. 1662. Scac.

Stone v. Ludlowe and others. [Hardr. 321.]

Though complainant did not shew how he was entitled to the tithes, yet held good; but *quære*.

IN a bill for tithes due to the complainant, as vicar and incumbent of _____ in *Essex*, the complainant did not shew how he was entitled to them, *viz.* by prescription, endowment, or otherwise; and the court held it to be good notwithstanding. *Which note*, for it is against many precedents in this court, which I have known of demurrers for that cause held to be good.

M. 14 Car. II. A.D. 1662. Scac.

Compost v. ——— [Hardr. 315.]

The king may prescribe in *non decimando*.

Supra 167.

IN an action of debt on the 2 & 3 E. 6. for tithes of *Eltham Park* in *Kent*, the general issue was pleaded, and upon a trial at bar it was holden upon evidence by *Hale, C. B.* and the whole court, that the king is not by virtue of his prerogative discharged of tithes for the ancient demesnes of the crown; but, that he is capable of a discharge *de non decimando* by prescription, because he is *persona mixta*, as well as a bishop. *Vide 2 Rep.* Bishop of *Winchester's* case. But, if the king alien any of the lands which he is so discharged of tithes for, his patentee shall pay tithes; and not only so, but the prescription is destroyed for ever, though the same lands should afterwards come into the king's hands again, by escheat or otherwise.

Tr. 15 Car. II. A.D. 1663. Scac.

Twiss v. Brazen Nose College in Oxford, Blunt, and others.
[Hardr. 328.]

Vicar who hath, time out of mind, or for a long time, used to take tithes or other profits, shall not be con-

IN a bill at the suit of the vicar of *Gillingham*, in *Kent*, for tithes of the manor of *Uxbury*, and other lands belonging to the rectory impropriate of *Gillingham* aforesaid; the tithes demanded were for eight years last past, and ending in the year of our Lord 1661.

The case upon the hearing appeared to be, that for divers years before the bill exhibited, in the times of many vicars, the said tithes had been enjoyed by the said vicars of *Gillingham* aforesaid; but an

endowment was produced bearing date the 7th day of *March*, in the year 1362, mentioned to have been made by *Islip*, then archbishop of *Canterbury*, and preserved in the archbishop's register; by which it did not appear, that the vicar was endowed with any tithes of corn or grain; nor in the said instrument was liberty reserved to the archbishop, as is usual in such cases, to augment or diminish, &c. and it was thereupon insisted, that the vicar ought not to have those tithes.

But the court held, "that where a vicar has used time out of mind, or for a long time, to take tithes or other profits, he shall not be concluded by their not being expressed in the endowment of the vicarage," and that it had been often so held and ruled; and it shall be presumed, by reason of a long possession of such tithes, &c. that the vicarage has, at some time or other, been augmented therewith; and the not reserving such a power to the archbishop is not material; for an augmentation may have been notwithstanding with the assent of, or upon citing, all parties; but not without notice or citation; as it may be, when such a power, as aforesaid, is reserved to the archbishop. (a)

1663.
Twiss
v.
Brazen
Nose Col-
lege in Ox-
ford, Blunt,
and others.
cluded by
the tithes
not being
expressed
in the en-
dowment
of the vicar-
age.
* [515]

M. 16 Car. II. A.D. 1664. Scac.

Grant v. Hedding and Ball. [Hardr. 380.]

In a bill in equity for the tithes of a nursery sold; upon the hearing of the cause divers doubts and questions were made: as,

First, Whether tithes should be paid, if the trees yielded no other fruit?

Secondly, Whether tithes should be paid for those trees, that yield fruit, which pay tithes?

Thirdly, If some yield fruit and others not, whether or no, those that yield fruit, privilege and exempt the others that yield none, when they are all sold together? (b)

Fourthly, Whether tithes shall be paid for them, when they are sold and transplanted within the same parish?

Fifthly, Whether the vendor or vendee shall pay the tithe?

And the court was of opinion, that if the owner sells them and pulls them up himself, he shall pay the tithes; but if he sells them particularly to another, the vendee shall pay the tithes; as in case of tithes of corn, if corn be standing, the vendee shall pay the

Of tithes
due and
payable for
a nursery
trees, fruit,
and for
corn.

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(a) The decree-book states, that "the court, although fully satisfied by the proofs, with the plaintiff's right and title to the said tithes of corn and grain, as vicar of *Gillingham*, did notwithstanding think fit, before they proceeded to decree the said cause, to give the defendants time to consider whether they would desire a trial at law, touching the said tithes and the

"said plaintiff's right and title thereunto, which trial was to be at law." Time was accordingly given, but the defendants not appearing by counsel at the day appointed, a decree was made in favour of the plaintiff. (See *Doble v. Potman*, 512. and the editor's note. *Ibid.*)

(b) See *Adams v. Waller*, *infra*, 1234. 1 Rolle's Abr. 641.

1664.

Ingleby
v.
Wyvell.

tithes ; but if it be sold after severance, the vendor must. (c) *And adjourned.*

But afterwards tithes were decreed in all such cases.

(c) *Taswell v. Athill*, *infra*, 537. *Gibbs v. Wybourn*, Sir W. Jones, 410. *supra*, 501. *Lockin v. Davenport*, *supra*, 472.

M. 16 Car. II. A. D. 1664. Scac.

Ingleby v. Wyvell. [Hardr. 381.]

Between the years 1216 and 1261, a composition was made between the abbot and convent of the abbey of *Fountains*, of the Cistercian order, and the prebendary of *Studley*, that the abbot and convent should be for ever free from the payment of tithes of their lands which they tilled with their own hands, within a certain grange within the prebend, and that they should pay tithes for all lands without the grange, and that the abbot and

IN trover and conversion for a lamb and a sheaf of wheat, upon not guilty pleaded a special verdict was found to this effect: *viz.* that the abbey of *Fountains* had been time out of mind of the order of *Cisteaux*, which order was exempted from payment of tithes of their lands, *quas propriis manibus excolerent*: that before the council of *Lateran* this abbey was seised of the territory and grange of *Stenningforth* within the prebend of *Studley* and the parish of *Rippon*: that betwixt the years 1216 & 1261 there was a composition between the abbot and convent and the prebendary of the said prebend under their common seals, that the abbot and convent should be for ever free from payment of any tithes of their lands which they tilled at their own charge in *Stenningforth*, and belonging to their grange of *Galgach* within the territory of *Winkesley*, A. D. 1216, and that they should pay tithes for all other lands there and elsewhere out of the said grange of *Stenningforth*: and that the said abbot and convent should pay annually to the said prebendary and his successors the sum of five marks by equal portions, the one moiety to be paid at *Easter*, and the other moiety at *Michaelmas*. It was further found, that upon the 12th of *November*, A. D. 1359, there was another composition made between them under the seal of the convent and the prebendary, reciting the former composition, (but it was not found that it was confirmed by the patron and ordinary,) and by this latter composition, the prebendary and his successors for all time to come were to have their election yearly, either to receive tithes in kind of corn and grain arising within the places aforesaid, as well of lands in the hands of the abbot and convent, as in the hands and manurance of their tenants, else to receive five marks to be paid by the said abbot and convent in lieu thereof, so as such election were notified to the

convent should pay annually to the prebendary and his successors five marks. It was further found that in the year 1359 there was another composition reciting the former, but it was not found that this was confirmed by the patron and ordinary by which the prebendary and his successors were to have their election yearly, either to receive tithes in kind of corn and grain arising within the places assessed as well of lands in the hands of the abbot and convent as in the hands and manurance of their tenants, or to receive five marks, so as such election were notified to the abbot; and for those years in which the prebendary should chuse to receive tithes, the five marks were not to be paid. The possessions of the abbey came to the crown by stat. 31 *Hen.* 8. It was held that the second composition did not affect the successors of the prebendary, and that therefore the abbot was not bound by it; that the power of election was gone, and that therefore the first composition should stand, *quoad terras in manibus*, &c. and that for the others tithes in kind might be taken.

abbot, or to any of the monks resident within five miles of the abbey, or to the porter of the abbey, upon or before the feast of St. Thomas the martyr, in the presence of a proctor or of two good men; and for those years in which the prebendary should choose to receive tithes, the five marks should not be paid, *et contra*; and that when no election was made, the prebendary and his successors should be contented with the said five marks, saving the right of the tithe of lamb and wool, which was to be paid as formerly. It was then found, that the possessions of the abbey came to the crown by 31 H. 8., and that at the time of the trover, &c. the defendants were proprietors of the lands in *Stenningforth*, and that the plaintiff was seised in fee of the prebend, and that a lamb and sheaf were then renovant upon the lands. And whether or no tithes in kind should be paid for these lands, was the question.

1664.

Ingleby
v.
Wyoll.

Sir Francis Goodrick *pro quer.* First, he considered, that the last composition was good, though not confirmed, because it was for the melioration of the church, and gave them a benefit, which they had not by the first. And the rule is, that a parson, prebendary, or other sole ecclesiastical corporation, *potest meliorare, sed non pejorare conditionem et statum ecclesiæ.* *Vid. Bro. Corporat.* 68. 2 *Inst.* 343., 2 *Cro.* 252. And if a confirmation in this case were requisite and necessary, it shall be intended there was one. *Ex diuturnitate temporis omnia præsumuntur solemniter esse acta.*

2dly. He considered, whether this privilege to be discharged of tithes be such a personal privilege as that it cannot be released. And he conceived, it might be released and waived; for that *quilibet potest renunciare juri pro se introducto.* 2 *Inst.* 252., *Dy.* 249., Dr. Goodman's case. Also, here, the corporation being extinct, the privilege is gone, and the tithes are revived, as *Bro. Corporat.* 78., *Godsb. Rep.* 4., *Hob.* 40. 42. 44. *Andrew and Cooper's case*, 3 *Cro.* 675., 2 *Inst.* 491., 2 *Leon.* 71. But the king's farmer shall enjoy the privilege, because it does not consist with the king's dignity to occupy lands himself. *Vid. Poph.* 158.

Object. The Bishop of Winchester's case, 2 *Rep.* 11. and *Inglefield's case*, 7 *Rep.* 11., concerning personal privileges not transferable. Supra 167.

Resp. An appropriation cannot be granted over, and yet it may be disappropriated by a presentation. 2 *E.* 3. 8., *N. B.* 35., *Hob.* 152., 3 *Cro.* 176., (a) and so he concluded for the plaintiff.

— *Pro defendente.* First, the first composition here is well rooted and settled, and is in the nature of an exchange, as appears 2 *Rep.* 45., 2 *Inst.* 490., *Hob.* 42. Secondly, it seems not to be destroyed by the second. For the second is only by way of collateral agree-

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(a) *Contrò, Grendon v. Bishop of Lincoln*, *Plowd.* 493. *supra*, 147, 148.

1664.

Ingleby
v.
Wyvell.

ment, and sounds in covenant: there are no words in it of grant or release. And it cannot here be deemed an eligible inheritance, because it does not pass from both parties. And by a release of five marks, the whole would be discharged, so that it is not reciprocal. 44 E. 3. 5. Also, the corporation being dissolved, the second composition falls of itself. And it shall not be presumed, that this composition was confirmed, unless it be shewn; because the former, which is more ancient, was confirmed. So he concluded for the defendant.

Hale Chief Baron. By the first composition the abbot only is discharged *quamdiu propriis manibus, &c.*, but by the latter the abbot and his tenants are discharged of tithes of corn and hay only; so that there is a great difference between these two compositions. But he conceived, 1st, that the first composition was good, although the abbot were discharged by his order *quamdiu, &c.*: 2dly, that the abbot may well renounce the benefit of his privilege: 3dly, that there may well be a relinquishment of the former composition, and that it may be released or discharged. But the doubt in this case is, whether or no the second composition be good in law without a confirmation, and an annual election according to the composition; and who must make this election, and how, now that the prebend is dissolved, and by whom, and to whom the notice must be given. There was one *Southwell's* case in 44 *Eliz.* where an abbot had had a certain quantity of wood to be taken yearly in such a wood, or else a sum of money yearly at his election; and it was holden in that case, that the election was transferred to the king by the statute of dissolution of monasteries, and that it should go along with the land to the king's patentee. But here this prebend came to the king by the statute of 1 E. 6. of *Chantries, &c.* and whether the election in this case remains or not, may be a question.

Afterwards, in *Trin. Term. anno 17 Car. 2.* it was argued again by serjeant *Hardres* for the plaintiff.

First, there had been a question stirred, but not much insisted on by the defendant, *viz.* whether or no this privilege of the abbey to be free from the payment of tithes, may be waived or not. I shall not dwell upon that, for I take it to be very clear, that it may be waived. 1st. Because it was but a particular indulgence granted to the order of Cisterians, and for their benefit and advantage, and therefore it may be waived by them, in like manner as an exemption from serving upon juries, &c. may be waived at one time, and resumed at another; as is very usual and frequent.

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Secondly, It is a rule in law, that whatsoever is created may by some means or other be dissolved and extinguished, though some things cannot be granted over: as in *Lampel's* case, 10 *Rep.* 46., a possibility of a term, though not grantable over, yet may be released to the tenant in possession. *Hob.* 307. an appropriation,

though not grantable over, yet may become inappropriate by a presentment. *N. B.* 35., 8 *H.* 7. 12., 21 *E.* 4. 58. *b.* a corody in certain in an abbey, though not grantable over by the founder, yet may be released and extinguished by him. So here.

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But the second and more difficult point is this, *viz.* whether this second composition be good or no, because not confirmed by the patron and ordinary. And I conceive that it is good notwithstanding, as our case is, and that for these reasons.

First, The second composition is wholly for the benefit of the prebendary and his successors, and is an enlargement of the former, because by this second composition he has an election, to take either his five marks, or his tithes in kind, whether he will; whereas, by the first composition, he is tied up to his five marks: and in such cases successors are bound, though without confirmation. 44 *E.* 3. 21, 22. in *Octavian Lombard's* case, tenant in tail charged the land with a rent-charge for a release of the right of a stranger: and held, that this shall bind the issue in tail, notwithstanding the statute of *Westm.* 2., 48 *E.* 3. 11. *b.* the like of a recovery in value by the tenant in tail; because the issue is at no loss by it. *Perk.* 17. Tenant in tail may determine his election as to so many acres, or a rent-charge, and the issue shall be bound by it. So here, no loss, but a profit accrues to the succeeding prebendary: and it is a rule in law, *Co. Litt.* 102. *b.* 341. *a.*, *Mag. Cart.* 3. *a.* that a parson without his patron and ordinary may *meliorare statum ecclesiæ suæ*. And so in our case.

Secondly, The second composition was made only for a further explanation of the former, and by way of superoneration, and is a surcharge upon the abbot and his successors without any diminution to the prebend: and in that case a confirmation is not requisite. If there be a composition confirmed betwixt a parson and his parishioner, by which the parishioner is to pay 5*l.* in lieu of his tithes for ten years; and afterwards another composition be made, whereby the parishioner agrees to pay 6*l.* for those ten years; this second is good without a confirmation, because it is an enlargement of the former, and more for the parson's advantage than that was.

Thirdly, The same may be proved by the parallel betwixt the parson of a church and an infant: for our authorities resemble these two to one another; as appears *Co. Litt.* 341. *a.* *Mag. Cart.* 3. *a.* *Ecclesia infra ætatem existit, et fungitur vice minoris.* Now *Co. Litt.* 337. *Minor statum suum meliorare potest, non deteriorare.* And, therefore, if an infant submit to an award, which is made for his advantage, he shall be bound by it. 13 *H.* 4. 12., 10 *H.* 6. 10. So, if an infant makes partition, or assigns dower, if it be equal and just, he shall be bound by it. The like of a parson.

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A third thing is this, *viz.* admitting that the second composition is good, whether or no it be now possible for it to be performed, because no election can now be made in form as directed by the composition, because now the abbey is dissolved, and the corporation extinguished; and the prebend also, with all its possessions, is given to the crown; the one by 31 *H.* 8., the other by 1 *E.* 6. And yet I conceive all this is no hindrance, but that tithes in kind may be recovered.

First, As for the dissolution of the abbey and extinguishment of the corporation, that will create no impediment, because it comes by the act of the corporation itself (to wit) by their surrender; for the act of 31 *H.* 8. vests nothing in the king, but what the abbies themselves surrendered since the 27 *H.* 8. as appears by the statute; and it is a rule in law, that *res inter alios acta alteri nocere non debet, sed prodesse potest.* If a lessee for years charge his estate with a rent, and then surrender, yet the charge continues as long as the term would have lasted, if it had been suffered to run out in time. 5 *H.* 5. 10. Secondly, As for the accession of the prebend to the crown by the statute of 1 *E.* 6. it is there enacted, that all tithes and hereditaments appertaining to any hospital given to the king, shall be in him in as ample manner as in the hospital, and as if they had been particularly named: and it is also enacted, that the king shall enjoy all profits, commodities, &c. appertaining to any hospital by any assurance, composition, or otherwise. So that all is preserved for, and reserved to, the king, that did appertain to any hospital. And unity of possession in the king, of the abbey and the prebend, breaks no squares: for tithes, and a composition for tithes, are collateral to the land, and revive by severance, as appears in 11 *Rep.* 23. *Harpur's* case: and where there can be no election, there, the party that is to have the benefit of it, shall have and enjoy the thing for which the recompence is given, without any election. [521] *Southwell* and *Ward's* case: *M.* 33 & 34 *Eliz.* *Rot.* 229. per *Popham*, *Fenner*, and *Clinch*, in manuscript, and printed in *Popham's Rep.* 91. and adjudged 36 & 37 *Eliz.*

The prior of *St. Faith's*, 13 *E.* 4. made a grant of 200 faggots or focals to the hospital of *St. Giles's* in *Norwich*, or of 20s. in lieu of them, at the election of the hospital, with a clause of distress, reasonable notice of the election being given; and the hospital covenanted to give notice in the church belonging to the hospital. Afterwards the hospital came to the crown, per 1 *E.* 6. who granted over the hospital with the said rent, and the grantee distrained for the focals. It was there adjudged, 1st, that the focals pass by the grant of the hospital, and the rent of 20s. though the focals are not expressed in the grant: 2dly, that there needs no election, because the thing granted was the focals, and the 20s. are but by

way of recompence for it, and as an allowance and satisfaction for the same. And a difference was taken, where the election was precedent, and where subsequent to the grant. If a man grants to another a robe, or 20s., there the election is precedent to the interest of the grantee: here, it is not so. *Vide 2 Rep. 31. Sir Rowland Hayward's case.* Now this case of the prior of St. Faith's resembles our case in all respects: for here is a composition for tithes in kind, or else for five marks in lieu; and the hospital there came to the king by 1 E. 6. as ours does here, and yet the election remained. But in our case there is a clause, that when there is no election made, the prebendary shall content himself with the five marks. But to that I answer, that this clause must have a reasonable construction and intendment, *viz.* that as long as there may be an election made by any reasonable way or means, so long there shall be an election, else only five marks due. But here there can be no election made at all according to the composition, by reason that the abbey is dissolved, and that by their own act; and it is a rule in law, that *impotentia excusat legem; et lex non cogit ad impossibilia.* 42 E. 3. 5. if a man covenants to leave lands in as good plight as he found them, and trees are blown down by tempest, he is excused. 5 Rep. 20. *St. Anthony Maine's case,* a lessor covenants to make a new lease to the lessee upon surrender of the former; if afterwards he grant the reversion to another for term of years, the covenant is broken, though no surrender be made, for that he has disabled himself to take a surrender.

Thirdly, If an election be necessary, the plaintiff has made his election; for he has preferred his bill for tithes, and brought the cause to a hearing; which is the same thing as if he had declared at law; and that does amount to an election; as when a man brings a writ of annuity, and counts upon it, 5 H. 7. 33. *F. N. B.* 152. or, the bringing of a writ of dower, and counting upon it, 12 E. 2. *Dower* 158. and the bringing of an assize amounts to a continual claim, 9 E. 2. *Age* 141. So I conclude, that the second composition is a good composition; that it remains in force for the benefit of the prebendary, and all claiming under him; and that no election is requisite, *quia vana et inutilis*; and that if an election must be made, the plaintiff here has made his election: and I prayed judgment for the plaintiff. [522]

Afterwards, the court delivered their opinions, that the second composition did not affect the successors of the prebendary, and therefore that the abbot was not bound by it. The reason seems to be, because, by the first composition, the prebendary and his successors were bound only *quamdiu propriis manibus, &c.* and by the second composition the five marks go in recompence of all,

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1664. whether *in propriis manibus*, or in the hands of the tenants. But to this it may be answered, that it is still at the successor's election to take the five marks, or tithes in kind, and therefore that he is at no prejudice.

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The court likewise held, that the power of election is gone, because it cannot now be made according to the composition: and that therefore, the first composition should stand *quoad terras in propriis manibus*; and for the others, that tithes in kind might be taken, as before; for that the election is destroyed. And judgement was given *pro defendente*. (a)

M. 23 Car. II. A.D. 1671. Scac.

Risden, clerk, v. *Crouch*. [Decree Book, 26th Oct. 1 Wood. 117.]

Hops are in their nature a small tithe, and therefore a custom to pay 6s. 8d. an acre to the rector, in lieu of the tithe of hops, the vicar being endowed with the small tithes is bad.

1 Sid. 443.
1 Vent. 61.
2 Keb. 612.
S.C.

* [523]

THE bill stated, that the plaintiff, for four years past, is and hath been *vicar* of the parish of *Ashford*, in the county of *Kent*, and ought to have had and received all manner of tithes and church duties, yearly arising, &c. within the said parish, due to the *vicar*; that the defendants for the same time have enjoyed several messuages, lands, tenements, and several hop-grounds planted with hops, within the said parish, and have picked and carried away the * same, without setting out or rendering the tithe thereof, or any thing in lieu, and had several other titheable matters and things, the tithe whereof ought to have been answered to the plaintiff, but that they refused, saying, that the plaintiff had no right to the tithe of hops.

The defendants admitted their inhabitaney, and set forth the quantities and values of their hops, and then stated, that there is and hath been an ancient custom, time out of mind, in the said parish, that every planter of hops shall pay to the *parson* of the said parish, 6s. 8d. for every acre in lieu of the tithe thereof, and that the same of right belongs to the *parson* of the said parish, who hath constantly, according to such custom, received the same.

The court declared, that there can be no such custom for the payment of a *modus*, in lieu of the tithe of hops, to the *parson*, for that hops, being in their nature *small tithes*, do belong to the vicar.

The court therefore ordered, that the defendants shall pay to the plaintiff the values of the tithes of their hops which they had in the years aforesaid, according to the values set forth in their answers,

(a) Note, this action was directed by the court of exchequer upon a bill filed by the plaintiff, as proprietor of the prebend of *Studley*, for an ac-

count of the tithes of *Stanningforth*. See 1 Wood's *Decrees*, 24. 73.

viz. the defendant *Crouch* 7l. for the two years mentioned in the bill, and the defendant *Lounds*, 20s. for 1669; the plaintiff being willing to accept thereof accordingly. (a)

1671.

Risden,
clerk,
v.
Crouch.

Tr. 26 Car. II. A. D. 1674.

Conant, clerk, v. *Greaves*, Bart. [Decree Book, 6th July.
1 Wood. 140.]

THE bill stated, that the plaintiff *Conant* had been lawful rector of *Beeding*, in the county of *Sussex*, for five years past, and was entitled to all the tithes within the said parish that had been accustomed to be paid; that the defendant was owner of certain lands called *the Forest of Saint Leonard's* within the said parish, and ought to pay all the great and small tithes arising therein to the rector, or the best buck and doe yearly, at every season, in lieu of the tithes for the said forest; that the defendant, for five years past, had refused to pay any tithes for the said forest; that the plaintiff *Turnor*, as tenant to the said rector, ought to have the best buck and doe yearly, at every season, paid to him in specie, the same being worth ten pounds *per annum*, in full satisfaction for the tithes arising yearly out of the said forest.

The defendant confessed, that he was owner of *the Forest of Saint Leonard's*; and that before and since the plaintiff was rector of *Beeding*, he had given orders to his keepers or tenants of the said forest that they should kill *the tithe deer* when demanded; and that the reason they had not, for two years past, been paid was, that the plaintiff refused to pay the keeper's fees.

[524]
The tithes
of a forest
cannot be
withholden
for non-
payment of
the keeper's
fees.

The court ordered, that the defendant should forthwith pay to the plaintiff *Turnor* the several bucks and does in arrear in specie, due and owing, as other bucks and does are usually paid, upon warrants.

And it was further ordered, that the defendant should, for the future, pay and deliver to the plaintiff *Turnor*, the lessee, during the term of his lease, and after the expiration thereof to the rector, a buck and doe yearly of forest deer, in specie, in lieu of the tithes of the said forest, at the respective seasons, for the time to come, as other bucks and does were usually paid and delivered, upon warrants, without costs.

M. 27 Car. II. A. D. 1675. Scac.

Turner v. *Weedon* and others. [Decree Book. 1 Wood. 150.]

THIS was a bill by the plaintiff, as rector of *Soulderne* in the county of *Oxford*, for an account of all tithes, predial, personal, and mixed.

(a) See *Knight v. Halsey*, *infra*, 1531. and the cases there cited.

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The defendants plead a *modus* of 4d. for every barren sheep and dry beast; a halfpenny for every sheep sold after *Candlemas*; a third of the wool of all sheep brought in after *Candlemas*; and that no tithe is due for coppice and hedge row wood used in husbandry;

* [525]

The defendants, *Weedon, Kilby, Lord, Dodwell, and King*, put in their plea and answer; and the defendants *Wells and Smith* their answers; and for plea said, that the plaintiff, by his bill, demands tithe wood for hedge-rows and coppice-woods; for dry beasts, for the time they were kept and fatted; for barren sheep sold before shearing time; and for the second crop, or aftermath of meadow ground; that, time out of mind, there had been a *rate tithe* for barren sheep and dry beasts kept and sold within the said parish; *viz.* four-pence, and not above, for every cow kept, fatted, and sold there; one halfpenny for every barren sheep sold after *Candlemas*, and before shearing time, the third of the wool for all sheep brought in after *Candlemas*, and sold before *Candlemas* following; and that no other tithes were due for the same; that for the aftermath of meadow no tithes at all were due, by custom nor otherwise; nor for hedge-rows or coppice wood spent or used in the premises to which the same belong; nor for any horses kept and *used about the same, or for any other use: and they set forth the particulars of their tithes.

Upon arguing this plea it was ordered, that the defendants should answer over, and the benefit of the plea be saved to the hearing.

The defendants thereupon put in a further answer; the plaintiff replied; and issue being joined, witnesses were examined; and the cause came on to be heard the 11th instant.

And upon hearing counsel on both sides, and reading several depositions taken in the cause, and a decree made in a cause the 3d of *July*, in 15 C. 1. in chancery, whereby it appeared, that the matter had been referred to the then bishop of *Oxford* to examine the best way for the payment of tithes, and whether the rate of 40s. a yard land, formerly decreed at the first inclosure, would be prejudicial to the church who made his certificate, that he did conceive the payment of tithes in kind was, and would be for the future, a greater benefit to the church than the 40s. *per annum* in lieu of tithes for every yard land could be; it was ordered, adjudged, and decreed, in the said *court of chancery*, that the said decree, as touching the composition and agreement for payment of tithes should be reversed and made void as against the plaintiff and the church of *Soulderne*, and the plaintiff be left at liberty to take his tithes in kind, any thing in the aforesaid decree to the contrary notwithstanding; and upon long debate of the matter, for that it was insisted upon by the counsel for the plaintiff, that the custom of one halfpenny a sheep sold before shearing, or after, had already been adjudged an unreasonable custom at common law, in the case of *Weeden v. Harden*, in the late king *Charles's* reign; the court declared they would further consider thereof.

The cause now came on again; and on reading several depositions, and hearing counsel on both sides; and on full debate concerning the customs pretended by the defendants; the court declared, that the custom of a halfpenny for a sheep was an unreasonable custom.

And as to all the other customs (except four-pence for a dry cow, and the tithe of aftermath, or second crop of meadow, for which the court would direct *a trial at law*,) they declared all the other customs pretended by the defendants to be unreasonable, and overruled the same.

Whereupon it was this day ordered by the court, that the defendants should pay their tithes in kind to the plaintiff, *viz.* for coppice *wood, and for hedge rows, and loppings of trees, when sold or not spent in the house; the tenth of the value of the depasturage of sheep, according to the time of their being kept, sold, and removed unshorn; and likewise for all other dry cattle, fed, kept, or depastured (except beasts of the plough and pail, and dry cows, which was referred to *a trial at law*,) to pay according to the value of the herbage: tithe wool to be paid, and tithe milk, at all times in the year; lambs to be tithed when fit to live without the dam; and calves to be paid in kind: and it was referred to the deputy-remembrancer to compute and report the same.

And as to the custom of four-pence for every dry cow fed, and for the aftermath, or second crop of meadow, the same was referred to a trial at law, and the equity reserved till after such trial had.

Tr. 28 Car. II. A. D. 1676. Scac.

Skinner, clerk, v. Smith. [Decree Book, 8th June. 1 Wood, 155.]

THE bill stated, that for six years past, the plaintiff was, and now is the rector of the parish church of *Hartlebury*, in the county of *Worcester*, and, as rector, ought to have all manner of tithes, both great and small, coming, &c. within the said parish.

The defendant confessed the plaintiff's title to the rectory, and tithes, and stated that he had paid the plaintiff all tithes due to him, except the tithes of certain lands, containing eighty odd acres, called *Hartlebury Park*, of which he had been tenant about four years, at 48*l.* a year; that he had depastured several cattle upon the said ground, but could not set forth the particular number; that the bishop of *Worcester*, and his predecessors, for time whereof the memory of man is not to the contrary, had holden the said lands freed and discharged from all tithes; that he had two colts and one calf, during the said years, the tithe whereof is four-pence a colt, and one penny in a shilling for a calf, which is ten-pence; that he depastured on the said lands all sorts of young cattle for

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but the court declared all the said customs to be unreasonable;

and decreed the tithes of coppice wood, hedge rows, and loppings; sheep unshorn, dry cattle, wool, milk, lamb, and calves, to be paid in kind.

* [526]

Where it appeared that prior to the disparking of a park, a shoulder of every deer killed therein had been paid to the parson in lieu of the tithe of the park, the court held the lands titheable.

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Skinner,
clerk,
v.
Smith.

several strangers, and yearly kept sheep, and sheared some yearly, and had some lambs; and he set forth the value of the tithes; and that for sheep sold before the shearing time, the usual tithe is fourpence a score; and that the full tithes of the said lands were yearly worth about 20s.

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Upon hearing counsel on both sides, and reading several depositions taken on behalf of the plaintiff, whereby it appeared, that before the disparking of the said park, the shoulder of every deer, killed in the said park, was paid to the rector of the said parish, for and in lieu of the tithe of the said park; and upon long debate of the matter,

It was ordered by the court, that the defendant should forthwith pay to the plaintiff the values of the tithes coming, growing, and renewing within the said park, for the said four years, in the bill mentioned, according to the answer, which, at 20s. *per annum*, amounted to 4*l.* (a)

M. 29 Car. II. A. D. 1677. In Canc.

Anon. [2 Freem. 27. 2 Ch. Ca. 237.]

Bill for
small tithes
against a
quaker,
taken *pro*
confesso,
defendant
refusing to
answer:
and a de-
cree for
plaintiff,
with refer-
ence to a
master of
the valu-
ation; and a

A BILL being preferred against a quaker for tithes, who refused to answer upon oath; the defendant was brought, by several orders to the bar; and being indeed a quaker, prayed to answer without oath; and having been brought up three times before; the lord chancellor did admonish him of the peril, that the bill would be taken for true, entirely as it is laid, if he answered not; but defendant saying as before, the chancellor pronounced his decree for the plaintiff, and that the bill be taken *pro confesso*; and he referred the valuation to a master, and to examine what was due; and to be armed with a commission for that purpose. (b)

Chancery
has cogni-
zance of
tithes as
well as the
exchequer.
Sir John
Churchill,
amicus
curiæ.

And the lord chancellor declared, that this court had a cognizance of matters of tithes, as well as the *exchequer*; and that the plaintiff had *his choice of the court*; though sir John Churchill, not being of counsel, but *amicus curiæ*, said, that this cause for tithes, especially *small tithes*, was not proper for this court, and had not been used.

H. 30 Car. II. A. D. 1678.

Dodd, clerk, v. Ingleton. [Decree Book, 24th Feb. 1 Wood. 188.]

The whole
tenth meal's
milk of

THE plaintiff, as vicar of the vicarage and parish church of *Chigwell* in the county of *Essex*, claimed the tithe of milk, and com-

(a) See *Nanton v. Clarke*, *infra*, 609. (b) See statutes 7 & 8 Will. 3. c. 34. § 4.; 1 Geo. 1. stat. 2. c. 6. § 2.; and 53 Geo. 3. c. 127. § 6.

plained, that the defendant, under colour of some words in a decretal order made in this court in a former cause between the now **plaintiff* and *H. Hudson* and others, inhabitants of *Chigwell*(a), had not sent or carried the same to the plaintiff's house every tenth day, or meal as he ought to have done, according to the custom of the said parish.

The defendant denied any custom for carrying tithe milk to the vicar's house.

The court being unanimously of opinion, that the *tenth meal's milk*, and not the *tenth of every meal's milk*, ought to be paid for tithes, it is ordered, by consent of the defendant's counsel, that the defendant, for the future, shall pay to the plaintiff his whole tenth meal's milk of all his cows every evening.

But as there was not any *custom* within the said parish of *Chigwell* insisted on by either side, for the plaintiff's fetching his tithe milk, or for the defendant's bringing the same either to the church porch, or to the vicarage-house in the said parish of *Chigwell*; and the court being divided in opinion, whether of right the same ought to be fetched by the plaintiff, or carried by the defendant; the cause was ordered to stand over, that the court might further consider and advise thereof in the mean time; and, on the 15th of *May* 1679, it was further ordered again to stand over, and that the court will hear counsel on both sides, as well civilians as others, as to the common law right; and on the 22d of *May* 1679, after hearing the civilians, and counsel on both sides, and upon full debate, it was ordered again to stand over for the opinion of the court.

On the 10th of *November* 1679, the cause came on to be further heard, when it was ordered, adjudged, and decreed by the court, that the defendant, for the future, shall pay to the plaintiff his whole *tenth meal's milk* of all his cows every morning, and his whole *tenth meal's milk* every evening; and for that there is not any custom within the said parish of *Chigwell* insisted upon on either side for the plaintiff's fetching his tithe milk, or for the said defendant bringing the same, either to the church porch, or to the vicarage-house in the said parish of *Chigwell*; and the court being of opinion, that tithe milk is due of *common right*, and that as well for the preservation of the same as for the convenience in collecting the said milk, the same ought to be brought to the plaintiff, it is thereupon further ordered, &c. that the defendant, for the future, shall bring or send his tithe milk to the church porch within the said parish of *Chigwell*, as the same shall become due from time to time, that is

1678.

Dodd,
clerk,
v.
Ingletom.

every morn-
ing and
evening is
due for the
tithe of
milk.
1 Freem.
329.
Raym. 377.
Rayn. 54.
* [528]

[529]
This point
has been
since over-
ruled.

(a) In the case of the present plaintiff, *Dodd* v. *Hudson*, 29th April, 1675, 27 Car. 2. the court ordered, "that the defendants shall pay to the plaintiff tithe milk in kind all the year

"round, the said plaintiff or his tithe-gatherer making a demand of the same at the respective habitations of the said defendants." Book of Decrees and Orders.

1678. to say, his, the defendant's, whole tenth meal's milk every tenth morning, and his whole tenth meal's milk every evening, to the end that the plaintiff, or his agent, or servant, in that behalf appointed, may receive the same accordingly without costs. (a)

Dodd,
clerk,
v.
Ingleton.

P. 31 Car. II. A.D. 1679. Scac.

Legross v. Levemoor. [Dodd's MSS.]

Entries in
a predeces-
sor's books
evidence for
the parson.

ON a trial at law for tithes of a mill, the plaintiff offered in evidence an ancient book, (produced in this court at the hearing,) wherein one of his predecessors had made entries of what he had received for tithes for several years, whilst he was vicar, as well for the mill in question, as for other tithes. But the judge would not suffer it to be read in evidence, whereby the plaintiff was nonsuited. A new trial was ordered on payment of costs, and, by the defendant's consent, the book to be read in evidence.

H. 31 & 32 Car. II. A.D. 1680. Scac.

Turnor v. Smith. [MSS.]

Stub-oak
and ash
tithable un-
less ex-
empted by
custom.

BILL by rector for tithes of coppice-wood and underwood. The defendant insisted it was not titheable, being above 30 years' growth, and much of it sold by him for timber.

Now forasmuch (in the very words of the court) as it appeared to the court by the proofs that the wood felled by the defendant did consist principally of hornbeam, fallow, hazle, and ash, and stub-oak and ash being titheable wood, and in the county of *Essex* never accounted timber; the court declare that the plaintiff ought to have tithe in kind for the same. But in regard there were some trees of oak and ash being seconds or standards, which, growing promiscuously on the said coppice, were felled, and the heads or tops thereof made into faggots, for which no tithe was due to the plaintiff; decree that it be referred to the auditor to take an account of what coppice-wood or underwood, or woods growing promiscuously on stubs, or stems, the defendant felled, and what timber trees, or trees of oak, ash, or elm, commonly called seconds or standards, were felled by the defendant, and sold for timber: and as to the coppice-wood or underwood, and wood growing on stubs or stems, the auditor is to compute the value, and what is due for the tithe thereof. (b)

(a) As to the place where the tithe of milk is payable by common law, see *Dodson v. Oliver*, Bun. 73. *infra*, 623. *Carthew v. Edwards*, 3 Burn's E. L. 510. *infra*, 826. *Bedle v. Miller*, cited in *Erskine v. Ruffle*, *infra*, 969, 970. as to the mode. *Bate v. Sprakling*, *infra*, 618. *Bos-*

worth v. Limbrick, 1101. 1110. *Hutchins v. Full*, 1200.

(b) See *Walton v. Tryon*, *infra*, 831. *Soby v. Molins*, *infra*, 829. *Ford v. Racster*, 4 M. & S. 130. *infra*, vol. ii.





